PUBLIC AUTHORITIES AND COOPERATIVES TO
PROMOTE THE USE OF ELECTRICITY

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GENERAL VIEW OF FEDERAL AND STATE POWER LEGISLATION

This paper deals with recent federal and state legislation designed to promote the use of electric power through public authority corporations and cooperatives. The writers have not included amendments to the laws of municipal corporations, permitting them to take advantage of grants and loans by the Federal Government. 1 The permanent federal program of rural electrification was initiated by the Executive Order of May 11, 1935, establishing the Rural Electrification Administration, and by the Rural Electrification Act of 1936. 2 As one of several programs

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1 For an exhaustive list of such statutes see: Foley, Revenue Financing of Public Enterprises, Footnotes, appendices A and B. (1936) 35 MICH. L. REV. 1 Appendices begin on pages 30 and 35 respectively.

2 Executive Order 7037, establishing the Rural Electrification Administration reads:

"By virtue of and pursuant to the authority vested in me under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (Public Resolution No. 11, 74th Congress), I hereby establish an agency within the Government to be known as the 'Rural Electrification Administration', the head thereof to be known as the Administrator.

"I hereby prescribe the following duties and functions of the said Rural Electrification Administration to be exercised and performed by the Administrator thereof to be hereafter appointed:

To initiate, formulate, administer, and supervise a program of approved projects with respect to the generation, transmission, and distribution of electric energy in rural areas.
whose purpose was to deal with the pressing problems of unemployment, Congress inaugurated a policy of public works. Its object was not only to furnish employment, but at the same time to create useful and self-liquidating public improvements. Questions of the power of the Federal Government to overcome constitutional obstacles, and prospects of long drawn out litigation made it necessary to carry out part of this program by loans and grants to the states and their political subdivisions, under the authority of the General Welfare Clause of the Constitution. Power projects, more perhaps than any other, lend themselves readily to such requirements.

The Rural Electrification Act of 1936 forms the legislative basis for the Rural Electrification Administration, "all of the

"In the performance of such duties and functions, expenditures are hereby authorized for necessary supplies and equipment; law books and books of reference, directories, periodicals, newspapers and press clippings; travel expenses, including the expense of attendance at meetings when specifically authorized by the Administrator; rental at the seat of Government and elsewhere; purchase, operation and maintenance of passenger-carrying vehicles; printing and binding; and incidental expenses; and I hereby authorize the Administrator to accept and utilize such voluntary and uncompensated services and, with the consent of the State, such State and local officers and employees, and appoint, without regard to the provisions of the civil service laws, such officers and employees, as may be necessary, prescribe their duties and responsibilities and without regard to the Classification Act of 1923, as amended, fix their compensation: Provided, that in so far as practicable, the persons employed under the authority of this Executive Order shall be selected from those receiving relief.

"To the extent necessary to carry out the provisions of this Executive Order the Administrator is authorized to acquire, by purchase or by the power of eminent domain, any real property or any interest therein and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

"For the administrative expenses of the Rural Electrification Administration there is hereby allocated to the Administration from the appropriation made by the Emergency Relief Appropriation Act of 1935 the sum of $75,000. Allocations will be made hereafter for authorized projects.

Franklin D. Roosevelt

The White House,
May 11, 1935."


powers of which shall be exercised by an Administrator." He is authorized to take over all the duties, functions and property of the Administration created by the Executive Order of 1935. He is vested with much discretion and is in complete charge of employment. He must choose his staff on a non-partisan basis, solely upon considerations of merit and efficiency, and if he is found by the President of the United States to have violated these provisions (Section 909) he shall be removed from office. The success of the whole undertaking depends largely upon him. His term is fixed at ten years. He is removed from political interference and his powers are broad enough to free his administration of the Act from red tape and bureaucracy.

The state legislation to be dealt with in this paper was undoubtedly enacted by the various states to secure to their inhabitants the benefits of grants and loans from the several federal agencies, chief of which, in addition to the Rural Electrification Administration, is the Public Works Administration. A brief summary of this legislation will prove helpful in understanding the analysis which we shall undertake presently. There are four general types of state statutes: (1) State Rural Electrification Authority Acts; (2) Power District Acts; (3) Improvement Authority Laws; and (4) Electric Membership Corporation Acts. Ten states have enacted "State Rural Electrification Authority Acts". Most of these Acts create a public corporation "to encourage and promote the fullest possible use of [electric] energy by all the inhabitants of the state by rendering service to said inhabitants, to whom energy is not available or, in the opinion of the board, is not available at reasonable rates." These corporations are managed by non-compensated directors. Each has "all powers necessary or requisite for the accomplishment of its corporate purpose". These corporations have the power to borrow money and pledge their revenues in payment, but their bonds are not indebtedness of the state. They are not municipal corporations because they do not have the power to levy and collect taxes, issue licenses, or to pass police ordinances. Hence they are not restricted by the usual constitutional limitations on municipal indebtedness. A number of states have recently enacted "Power District Acts". These Acts offer the Public Service Commissions an opportunity to group together neighboring cities or villages into one "municipal" corporation, called a "Power District", for the purpose of making electricity available within its territory. The "Power Districts" are not "authorities". We have included a discussion of them because the Acts creating them are quite similar to "Authority Acts"
included in this paper. Furthermore we shall compare them with authorities, pointing out their advantages and disadvantages. Alabama and South Dakota have enacted "The Improvement Authorities Law" which empowers any municipality by a referendum to create an authority to supply public services (including electricity) to the municipality and its inhabitants. The provisions of this law are similar to the provisions of the State Rural Electrification Authority Acts.

These various Acts give the state and its political subdivisions the advantage of operating through public corporations which have the flexibility of private corporations. Experience has shown that the orthodox municipal corporation is ill-adapted to the successful operation of public services. The old plan of creating layer after layer of municipalities over the same territory to care for the public needs in order to escape the usual constitutional debt limitations has proved a costly experiment. Its complexity and ramifications are such that the average voter is unable to place responsibility. The result may be political corruption and a waste of public funds.

Finally, we shall deal in this paper with legislation authorizing cooperatives. These laws are usually entitled, "Electric Membership Corporation Acts". These Acts permit individuals to incorporate a non-profit cooperative corporation for the purpose of furnishing themselves with electric energy. The statutes give these corporations broad powers, including the power of eminent domain, and the right to use highways and public rights-of-way.

Much of this legislation was drafted by the legal department of the Public Works Administration at the request of the various state governors. This was a natural procedure, since these officials were seeking loans and grants from this federal agency, which was bound by law to examine and approve of the legality of such loans before making them. Lawyers who have examined and approved special assessment bonds look upon such suggestions as routine matters, often requiring a test suit before they will approve the bond issue in question.

The Rural Electrification Act of 1936

This Act appropriates $410,000,000 to be available over a 10 year period; $50,000,000 the first year, which the Administrator

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5 The expose of the Commissioners of the Sanitary District of Chicago several years ago is a clear example.
is to secure at three per cent interest by discounting his securities with the Reconstruction Finance Corporation, and an appropriation of $40,000,000 annually for the next nine years. The Act provides that "Fifty percentum of the annual sums . . . shall be allotted yearly . . . for loans in the several States in the proportion which the number of their farms not then receiving central station electric service bears to the total number of farms of the United States not then receiving such service". As to the other half the Administrator is not restricted by any rule of allotment, except that not more than ten per cent of unallotted annual sums may be available in any state, "or in all the Territories". Any unexpended balance for any year goes into the next year's unallotted fund subject, however, to the ten per cent restriction above described. Section 904 authorizes the Administrator "to make loans to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples utility districts and cooperatives, nonprofit, or limited-dividend associations . . . for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric

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6 At the time the Act became effective, July 1, 1936, there were 6,800,000 farms in the United States and nearly 6,000,000 were without central-station service, (1936) 12 JOURNAL OF LAND & PUBLIC UTILITY ECONOMICS, 317. Administrative Order No. 20 of the Rural Electrification Administration, Sept. 28, 1936, fixed the number of farms without central-station electric service at 6,085,237. Such a farm, of course, is a farm which does not have access to a transmission or distribution line.

7 Sec. 913 states that the word "farm" "shall be deemed to mean a farm as defined in the publications of the Bureau of the Census". That definition is as follows:

"A 'farm' for census purposes, is all the land which is directly farmed by one person, either by his own labor alone or with the assistance of the members of his household or hired employees. The land operated by a partnership is likewise considered a farm. A 'farm' may consist of a single tract of land or of a number of separate tracts, and these several tracts may be held under tenures, as when one tract is owned by the farmer and another tract is rented by him.

"When a landowner has one or more tenants, renters, croppers, or managers, the land operated by each is considered a farm. Thus a plantation, the land operated by each cropper or tenant was reported as a separate farm, and the land operated by the owner or manager with or without wage hands likewise was reported as a separate farm. The enumerators were instructed not to report as a farm any tract of land of less than 3 acres, unless its agricultural products in 1929 were valued at $250 or more."

8 For amounts allotted to each state for the first fiscal year see Administrative Order No. 20 of the Rural Electrification Administration, September 28, 1936.
energy to persons in rural areas who are not receiving central station service . . . ”. Preference is to be given to the public agencies, cooperatives, and nonprofit or limited-dividend associations as against persons and concerns who are in the business for a profit. The loans shall be self-liquidating within twenty-five years, but a later section authorizes the Administrator to extend the time of repayment of principal and interest for five years. The security for the loans may consist solely of a pledge of the income from the contemplated project. The rate of interest on loans shall equal “ the average rate of interest payable by the United States of America on its obligations, having a maturity of ten or more years after the dates thereof, issued during the last preceding fiscal year in which any such obligations were issued.” The Administrator is authorized to make loans at the same rate of interest to those mentioned in Section 904, or to anyone supplying or installing electric equipment for “ the purpose of financing the wiring of the premises of persons in rural areas and the acquisition . . . of electrical . . . equipment ”. This Section does not provide for direct loans to consumers. The Administrator is authorized to “ purchase at any foreclosure or other sale, or otherwise to acquire, property pledged or mortgaged to secure any loan made pursuant to this chapter ”, and may operate, sell, or lease the same for a period not to exceed five years. No borrower of funds under Section 904 shall without the approval of the Administrator, alienate any of its property, rights, or franchises until its loan including interest has been repaid. The Administrator is authorized to make such studies or surveys as he deems necessary.

The status of Rural Electrification Administration projects as of November 15, 1936, was as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
<th>Miles</th>
<th>Customers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction specifications approved, under construction, or completed</td>
<td>$16,633,829</td>
<td>15,315.15</td>
<td>58,606</td>
</tr>
<tr>
<td>Loan contracts executed</td>
<td>5,353,200</td>
<td>5,056.80</td>
<td>17,145</td>
</tr>
<tr>
<td>Allotments approved</td>
<td>17,981,550</td>
<td>18,203.09</td>
<td>61,895</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$39,918,579</strong></td>
<td><strong>38,575.04</strong></td>
<td><strong>137,646</strong></td>
</tr>
</tbody>
</table>

$55,000 of the above amount was loaned for furnishing electrical appliances to customers; $75,000 to build a generating plant to supply three rural cooperatives.

Section 913 states that “ rural area ” “ shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof.”

(December, 1936) 2, No. 4 RURAL ELECTRIFICATION NEWS, 30, 31.
STATE RURAL ELECTRIFICATION AUTHORITY ACTS

Seven states—Alabama,¹¹ Mississippi,¹² New Mexico,¹³ Montana,¹⁴ South Carolina,¹⁵ South Dakota,¹⁶ and Tennessee¹⁷ have within recent years enacted with few changes the Rural Electrification Authority Act. We shall analyze these Acts and point out their differences.

Section 1 states the title of the Act.

Section 2 defines the meaning of certain words to aid in the interpretation of the Act. These definitions could not be summarized or explained in much less space than it would take to reproduce them. They read as follows:

(1) "Authority" shall mean the corporation created by this act.
(2) "Board" shall mean the board of directors of the Authority.¹⁸
(3) "Bonds" shall mean and include negotiable bonds, interim certificates or receipts, notes, debentures, and all other evidences of indebtedness either issued or the payment thereof assumed by the Authority.
(4) "Acquire" shall mean and include construct, acquire by purchase, lease, devise, gift or the exercise of the power of eminent domain, in the manner now or hereafter provided by law for the exercise thereof, or other mode of acquisition.¹⁹
(5) "Person" or "inhabitant" shall mean and include natural persons, firms, associations, corporations, business trusts, partnerships and bodies politic.
(6) "Energy" shall mean and include any and all electric energy no matter how generated or produced.²⁰
(7) "System" shall mean and include any plant, works, system, facilities, or properties, or parts thereof, together with all appur-

¹² H. B. 575, Laws 1936, effective March 26, 1936.
¹⁸ Montana omits the definitions of "authority" and "board". That Act confers the powers of the Authority upon the State Water Conservation Board, a body already in existence, and an agency of the State.
¹⁹ Alabama omits the last phrase, "or other mode of acquisition". After the words "eminent domain" Mississippi, South Carolina and Tennessee omit the phrase "in manner now or hereafter provided by law for the exercise thereof"; South Dakota prescribes certain code sections in lieu of the phrase.
²⁰ The Mississippi and Tennessee Acts read: "no matter how or where generated or produced."
tenances thereto, used or useful in the connection with the generation, production, transmission or distribution of energy. 21

(9) "Municipality" shall mean any city, town, village or county of the State. 22

(11) "Federal Agency" shall mean and include the United States of America, the President of the United States of America, the Federal Emergency Administration of Public Works, and any and all authorities, agencies, and instrumentalities of the United States of America, heretofore or hereafter created. 23

(12) "Improve" shall mean and include construct, reconstruct, improve, repair, extend, enlarge, or alter.

(13) "Service" shall mean and include the transmission, sale, or other disposition of energy at the lowest cost consistent with sound economy, public advantage and the prudent conduct of the business of the authority.

Section 3: A corporation, to be known as the "... Rural Electrification Authority" is hereby created as an agency of the State. Said Authority shall be a public corporation in perpetuity under its corporate name, and shall under that name be a body politic and corporate. 24

The next group of sections provide for a board of three directors, appointed by the governor, 25 entitled to no compensation, prohibited from holding any public office under the state; 26 and "the powers of the authority shall be vested in and exercised by a majority of the board. . . ." 27

21 Definition (8) in all except the Alabama act defines the word "State" as meaning the particular State adopting the Act.

22 Only Alabama and South Carolina include the word "county". Mississippi and New Mexico preface the words "city, town, village" by the word "incorporated". South Carolina adds "board of commission of state."

Definition (10) reads: "'Law' shall mean any act or statute, general, special or local of this State." Omitted by Mississippi and Tennessee.

23 Mississippi and Tennessee add "Tennessee Valley Authority".

24 The Alabama Act provides that such an authority "may be created hereunder". In a later section the Act provides that the corporation shall come into existence upon the appointment of the board, its organization, and certification of those facts to the Secretary of State. Alabama, South Carolina and South Dakota omit "as an agency of the State". The phrase probably has little significance as these corporations are undoubtedly an agency of the state anyway. The corporate purpose alone would make them such. The Montana Act declares that the State Water Conservation Board "is hereby created as the State Electrification Authority under the provision of this Act."

25 South Carolina provides for a board of certain designated public officials and college presidents.

26 Alabama, by an amendment, provides that the board may designate one of its members as general manager, fix his salary and define his duties.

27 Montana, as above noted, vests the powers of the Authority in its State Water Conservation Board.
The corporate purpose is "to encourage and promote the fullest possible use of energy by all of the inhabitants of the state by rendering service to said inhabitants, to whom energy is not available, or, in the opinion of the board, is not available at reasonable rates." 28

The general grant of powers reads:

"The authority is hereby vested with all powers necessary or requisite for the accomplishment of its corporate purpose and such powers as are capable of being delegated by the Legislature of the State of . . . ; and no enumeration of particular powers hereby granted shall be construed to impair any general grant of power herein contained, nor to limit any such grant to a power or powers of the same class or classes as those so enumerated." 29

Obviously, this section prevents courts from applying the obnoxious doctrine of expressio unius est exclusio alterius.

Among the specific grants of power are the ones common to private corporations and the least important are set out in the footnote for reference.30 The following quotation of the more important grants of specific powers will illustrate the extent of power conferred on the Authority:

"To render service to the inhabitants of the State and, by contract . . . with any person, federal agency or municipality or by its own employees. . . .

"To acquire, own, operate, maintain and improve a system or systems . . ." 31

28 Alabama unfortunately omits the phrase "in the opinion of the board." With the phrase left in, no "jurisdictional facts" are involved, because clearly the State could furnish electricity to all its inhabitants and hence can do so through a public corporation. Whether a city or county is receiving electricity from a private company at a reasonable rate is a question of opinion for the board and the board's opinion is not a justiciable question. But with the phrase left out, then the question of "reasonable rates" becomes a jurisdictional fact which must finally rest with a court, and the Authority is caught in the snarl that has kept courts and commissions in endless and futile litigation for the past forty years.

29 Montana omits this section.

30 "To sue and be sued.

"To have a seal and alter the same at pleasure. . . .

"To execute all instruments necessary or convenient including, but not limited to, indentures of trust, leases, and bonds. . . .

31 South Carolina, Mississippi and Tennessee authorize the condemnation of property "whether or not the same is owned or held for public use by corporations, associations or persons having the power of eminent domain."

This specific grant would hardly seem necessary, as the word "acquire" is defined broadly enough to include it, and especially when read in con-
"To cause surveys to be made of areas throughout the State for the purpose of determining the economic soundness of the acquisition of a system or systems therein; to make plans and estimates of cost of such system . . . and in connection therewith to enter on any lands, waters, and premises for the purpose of making such surveys, soundings and examinations."

"To have complete control and supervision of the system . . . and to make such rules and regulations governing the rendering of service thereby as in the judgment of the board may be just and equitable."

"To fix and collect rates and charges for service. . . ."

"To construct any part . . . of a system . . . along any street or public highway, over any lands which are now or may hereafter be the property of the State or any political subdivision thereof without obtaining any franchise or other permit therefor. The authority shall, however, restore any such street or highway to its former condition or state as near as may be and shall not use the same in a manner to unnecessarily impair its usefulness. . . . 32"

"To borrow money and issue bonds and to provide for the rights of the holders thereof."

"To accept gifts or grants of money or property, real or personal, and voluntary and uncompensated services from any person, federal agency or municipality."

"To make any and all contracts necessary or convenient for the full exercise of the powers herein granted, including, but not limited

junction with the specific grant to acquire property. These States probably add it as a matter of precaution.

The Mississippi Act, after granting the power of eminent domain, makes this provision:

"Provided, however, that where condemnation proceedings become necessary the judge of the circuit court in which such proceedings are filed shall upon application of the Authority and upon the deposit in the Court, to the use of the person or persons lawfully entitled thereto, of such an amount as the judge may deem necessary to assure just compensation, order that the right of possession shall issue immediately or as soon and upon such terms as the judge, in his discretion, may deem proper and just. Upon application of the parties in interest, the judge may order that the money deposited in court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceedings."

The Tennessee Act makes this provision:

"Provided, however, that where title to any property sought to be condemned is defective, it shall be passed by a decree of the Court; provided, further, that where condemnation proceedings become necessary the Court in which such proceedings are filed shall upon application by the Authority and upon the posting of a bond with the Clerk of the Court in such amount as the Court may deem commensurate with the value of the property, order that the right of possession shall issue immediately or as soon and upon such terms as the Court, in its discretion, may deem proper and just."

32 Mississippi and Tennessee make the use of such public ways dependent upon the consent of the local governments.
to: (a) Contracts with any person, federal agency, or municipality for the purchase or sale of energy at wholesale. (b) Contracts with any person, federal agency, or municipality for the management and conduct of the business of the authority or any part thereof.³³

"To do any and all acts and thing herein authorized or necessary or convenient to carry out the powers expressly given in this Act under, through or by means of its officers, agents and employees, or by contracts with any person, federal agency, or municipality." ³⁴

PROVISIONS DEALING WITH BONDS

The Authority is authorized to issue bonds ³⁵ in anticipation of its revenues,³⁶ for any corporate purposes; interest shall not

³³ Alabama adds: "(c) Contracts with any person, federal agency, municipality or bondholders, notwithstanding such contracts may operate as limits on the right of the authority to exercise any of the powers herein granted." (Italics added)

Mississippi and Tennessee add: "(c) contracts with any person, federal agency, or municipality for the acquisition of all or part of any system or systems. And in connection with any such contract to stipulate and agree to such covenants, terms and conditions as the board may deem appropriate, including, but without limitations, covenants, terms and conditions with respect to the resale rates, financial and accounting methods, services, operation and maintenance practices, and the manner of disposing of the revenues of the system or systems conducted and operated by the Authority." (Italics added)

³⁴ South Carolina adds this section:

"To subscribe to and comply with any rules or regulations made by any Federal Agency with regard to any grants or loans from any Federal Agency."

³⁵ The Alabama Act contains a provision not found in any of the other acts. Section 19 provides that no bond shall be issued or sold without the consent of the Public Works Board of Alabama, or if that body is not in existence, the Alabama Public Service Commission. That consent is not to be given until after a public hearing and a finding that the plan or program for which the money is being borrowed will "serve some public need, and is in the public interest." Approval of the plan prevents the Authority from using any of the funds for any other plan or project. The Authority must bear the cost of the proceedings.

This provision would seem to be inconsistent with the scheme as a whole, which is "to create a public corporation with the flexibility of a private corporation." Furthermore, these Acts have sought to avoid all possibility of litigation. This section is a standing invitation to all "who feel themselves aggrieved" to tie the Authority and its programs up in endless litigation. There is a section in the other acts which would have forestalled such appeals, but this section is left out in the Alabama Act. It reads:

"This Act is complete in itself and shall be controlling. The provisions of any other law, general, special, or local, except as provided in this Act, shall not limit or restrict the powers granted by this Act."

³⁶ Under Specific Powers the Mississippi Act contains this provision:

"To pledge all or any part of its revenues and to mortgage or otherwise encumber all or any part of its property for the purpose of securing
exceed six per cent; maturity shall not exceed forty years. The board is given wide discretion in fixing the form and details of the bond. If bonds are given in payment of property, the board may fix the value of the property, and its determination is conclusive. That settles all controversies that might arise about the bonds paying a greater rate of interest in cases in which property has been paid for in bonds instead of cash. The board is further authorized to repurchase its bonds out of available funds at a price not exceeding the principal amount thereof and accrued interest.37

The acts attempt to forestall litigation testing the validity of any bond because of any informality in its issuance, and to prevent any bond from being held void on a technicality.38 A prospective purchaser needs to look no further than to see that the bonds were issued pursuant to a resolution of the directors, and that the resolution contained a recital that the bonds “are issued pursuant to this Act”. The Acts expressly provide that the bonds are not debts of the state, and that no holder “shall ever have the right to compel any exercise of taxing power of the State or any political subdivision thereof.”

Under the section heading “Security for Bonds” the acts authorize the authorities to pledge all or any part of their revenues, to vest in a trustee the right to enforce any covenant or agreement, and “(3) To make such covenants and to do any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds or which, in the absolute discretion of the board, tend to make the bonds more marketable notwithstanding that such covenants, acts and things may restrict or

the payment of the principal and interest on any of its bonds or other obligations.”

37 Mississippi makes the bonds negotiable. That might aid in the sale of bonds payable solely out of revenues because it is very questionable whether such bonds would be negotiable.

38 The section reads:

“Said bonds bearing the signature of officers in office on the date of the signing thereof shall be valid and binding obligations notwithstanding that before the delivery thereof and payment therefor any or all the persons whose signatures appear thereon shall have ceased to be officers. The validity of said bonds shall not be dependent on nor affected by the validity or regularity of any proceedings relating to the acquisition or improvement of the system or systems for which said bonds are issued. The resolution or resolutions authorizing said bonds may provide that the bonds shall contain a recital that they are issued pursuant to this Act, which recital shall be conclusive evidence of their validity and of the regularity of their issuance.”
interfere with the exercise of the powers herein granted; it being the intention hereof to give the Authority power to do all things in the issuance of bonds, and for their security, that a private business corporation can do under the general law of the State”.

The Acts further provide that the Authorities shall not be operated for profit; that they shall prescribe and fix reasonable rates which shall be sufficient to repay all indebtedness for which the revenues have been pledged, and maintenance including “reserves therefor” which evidently means depreciation costs. The states then specifically agree not to alter or limit the rights of the authorities to fix and collect such rates “as may be necessary or advisable in order to produce sufficient revenue to meet all expenses of maintenance and operation of its system . . . , and to fulfill the terms of any agreements made with the holders of such bonds, or in any way impair the rights and remedies of the holders of such bonds”, until such bonds and interest have been paid.

As to the rights and remedies of the bondholders the statutes provide:

“In addition to all other rights and all other remedies, any holders of bonds of the authority, including a trustee for bondholders, shall have the right by mandamus or other suit, action or proceeding at law or in equity, to enforce his rights against the authority and the board of the authority, including the right to require the authority . . . to fix and collect rates and charges adequate to carry out any agreement as to, or pledge of, the revenues produced by such rates or charges, and to require the authority . . . to carry out any other covenants and agreements with such bondholders and to perform its . . . duties under this Act”.

Mississippi provided that the Authority and its property should be subject to taxation “in the same manner and to the same extent as a privately owned utility”; in South Carolina neither the Authority nor its securities are subject to taxation. The other Acts are silent on the subject. South Carolina completely exempts her Authority from regulation by any other state agency. That provision is surplusage. Tennessee has a separate Act which exempts public corporations, municipally-owned, federal agencies, and cooperatives from regulation by its Railroad and Public Utilities Commission. Mississippi and Tennessee authorized operations outside of the state.

39 The Alabama Act reads: “or interfere with the carrying out of its corporate purposes.”

The Acts close with provisions to the effect that in case of dissolution the assets shall pass to the state; a separability clause; and a declaration that the Act is complete within itself.

The New Hampshire Rural Electrification Act 41 is in one paragraph and reads:

"The governor and council, or its duly authorized agent or agents, are hereby authorized and empowered to cooperate and contract in the name of and on the behalf of the state with the federal government and its agencies in such manner and to such extent as they may deem for the best interests of the citizens of this state, for the purpose of promoting the construction, maintenance and operation of rural electric lines in territory not adequately furnished with electricity; to accept gifts or grants of money or property; and to do all necessary and proper things desired by the federal government to facilitate the distribution and use of electricity, electrical equipment and appliances." (Italics added.)

This Act authorizes certain agents to act for the State; it does not create a corporation. The phrase in italics is interesting. Clearly, this agency could contract for extension of service in territory not being served at all with electricity, or in territory where there was not enough available current to meet the needs or demands of the people. But could the agency invade territory in which plenty of electricity was available but the rate was so high that the community could not afford to buy it? Would the territory be "adequately supplied"? The answer calls for the intervention of a court, long-drawn-out and expensive litigation for which the public must eventually pay.

The North Carolina Rural Electrification Act 42 creates an agency, consisting of a board appointed by the governor, for the supervision of Electric Membership Corporations. It might be termed a clearing-house for such corporations. The North Carolina Rural Electrification Authority is not authorized to go into the power business itself, nor to borrow or lend money. It was created "to secure electrical service for the rural districts of the State where service is not now being rendered." (Italics ours) To carry out this purpose it was given the power to make surveys and investigate the feasibility of various projects, to pass upon the formation of electric membership corporations, "to have the power of eminent domain for the purpose of condemning rights of ways . . . either in its own name or on behalf of the electric membership corporations . . . , to have such right and authority to secure for said local communities or electric membership cor-

41 Chap. 135 (H. B. No. 449), Laws 1935, effective June 20, 1935.
Corporations . . . assistance from any agency of the United States Government, either by gift or loan, as may be possible, to aid said local community in securing electric energy . . . and to act as agent for any electric membership corporations . . . in securing loans or grants from any agency of the United States Government."

Section 3 states that the Authority shall have no power to fix rates or service charges or order extension of service. That power is vested in the Utilities Commission. But the Authority is given the status of a party to any such proceedings, and may initiate them. Section 2 authorizes the Authority to contact power companies in the behalf of electric membership corporations or any community, and to initiate any proceedings before the Utilities Commission in their behalf concerning rates and extension of lines by private utilities. The Act carries with it an annual appropriation of $10,000.

In general the scheme creates an expert body to furnish information to the communities on costs, ways and means of securing electric service; aids them in securing loans and grants, in contacting private power companies; and to take care of any legal questions that may arise.

The Vermont Rural Electrification Act creates a board to promote rural electrification. Section 2 reads:

"The board of rural electrification, with the written approval of the governor, is authorized and empowered to cooperate and contract in the name of and on the behalf of the State with the federal government and with others in the construction, maintenance and operation of rural electric lines to serve in territory not then being furnished electricity, to loan money at low rates of interest to persons for wiring their buildings and premises and for acquiring appliances, utensils and other devices so as to be fully equipped to receive and use electricity . . . to loan money at low rates of interest to private corporations operating or organized to operate an electric system, and municipal corporations operating an electric system, for the construction and maintenance of rural electric lines to serve in territory not then being furnished electricity, and to make contracts with said corporations for said purposes . . . to promote the organization of corporations to build, maintain and operate rural electric lines to serve in territory not then being

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43 The (January, 1937) Vol. 2 No. 5 RURAL ELECTRIFICATION NEWS 13, states that the Superior Court of Wake County, North Carolina, has ruled in the case of Carolina Power and Light Co. v. Johnston County Membership Corporation, that a certificate of necessity and convenience from the Public Utilities Commission is not required on the part of Electric Membership Corporations prior to operation.

furnished electricity, to accept grants, loans, appropriations and assistance from the state or federal government ... with the written consent of the governor, for any of the aforesaid purposes. . . ."

The Act provides that the governor may turn over certain funds to the board. Section 3 provides that non-profit private corporations may be organized to furnish electric service "in territory not then being furnished electricity" and exempts such corporations and their securities from taxation for six years. Section 4 gives the board exclusive jurisdiction over extensions of all lines constructed under this Act and all private corporations organized under the Act and receiving benefits. The purpose for which jurisdiction is granted over the corporations is not stated.

The Vermont Act merely sets up a promotional board. The board itself cannot go into the power business. It can only encourage by making loans to private and public corporations and cooperatives, the latter being authorized to be organized under this Act. The board may loan money to consumers for appliances. All of its encouragement is limited to "territory not then being furnished electricity".

**POWER DISTRICT ACTS**

In 1931 Wisconsin enacted a statute 45 providing for the creation of "Municipal Power Districts". These districts are municipal corporations, the statute reciting, "A municipal power district may be created as provided in this chapter and when so created shall be considered a municipal corporation and may exercise the powers herein granted." This statute provided that such a district might be created by two or more municipalities by taking the following steps: The governing bodies of half or more of the municipalities to be included may pass a resolution declaring that the public interest demands the creation of such a district, or ten per cent of the voters in the proposed district may petition for its creation. Such petition is submitted to the Railroad Commission and it is directed to render a report on the feasibility of the proposed plan within 90 days. Upon the expiration of that time, regardless of whether such report has been filed or whether it is favorable or not, an election is called in which all qualified voters are permitted to vote and the board of canvassers "shall order and declare said district created of the municipalities in which a majority of those voting on the proposition voted in favor of the creation of the district, provided, that

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45 Chap. 50, Laws 1931.
the total number of voters in such approving municipalities shall be not less than two-thirds of the number of voters within the district as first proposed." The creation of the district is not made to hinge upon a favorable report from the Railroad Commission, but undoubtedly an unfavorable report would influence the voters greatly. The statute provides that the district shall be divided into five subdivisions and each subdivision shall have one director appointed by the "chief executives of the municipalities included within said subdistricts." Each director is compensated $10 per day and expenses. The board of directors is authorized to exercise the powers of the district unless conferred upon others by law.

The district is given the powers of a private corporation and also the right of eminent domain. Its authority to own or operate a plant or system in competition with a privately owned system is dependent upon its securing a certificate of necessity and convenience from the Railroad Commission after a public hearing.

The power of the District to acquire an existing system which is privately owned calls for a brief discussion and review of the law of Wisconsin. In 1907, Wisconsin enacted the "indeterminate permit" law. Public utilities operating under this law are not granted a franchise for a fixed period, but for an indefinite time, and by operating under such a permit, agree to sell out to the municipality at the latter's request.\(^46\) If the parties can agree upon the amount of compensation, the sale is consummated upon the approval of the Railroad Commission. The city can "request" only after a favorable referendum. If the parties cannot agree or the public utility is unwilling to sell, the compensation is fixed by the Railroad Commission after a public hearing.\(^47\) The "indeterminate permit" eliminates the cumbersome proceedings in eminent domain, and the establishment before a court of the public necessity of acquisition. The Municipal Power District Act vests all permits and franchises owned by any municipality in the District; the Act further provides:

"Every public grant, either by state or through any municipality heretofore or hereafter granted to or held, owned or exercised by the owner . . . of any utility, or any permit, privilege, right, or franchise to operate the same is hereby made subject to the express conditions that such district may purchase, acquire and take such utility, in whole

\(^{46}\) Calumet Service Co. \textit{v.} Chilton, 148 Wis. 334, 135 N. W. 131 (1912); Delos F. Wilcox, \textit{The Indeterminate Permit as a Type of Public Utility Franchise}, (1926) 2 \textit{JOURNAL OF LAND & PUBLIC UTILITY ECONOMICS}, 327.

\(^{47}\) Wisconsin Power \& Light Co. \textit{v.} Public Service Commission, — Wis. —, 267 N. W. 386 (1936).
or in part, in the manner provided in this chapter, and the continued operation of any such utility from and after the organization of such district by the owner . . . shall be held to be an acceptance of and consent by the owner to said condition.

"From and after the organization of any district, no permit, privilege, right or franchise shall be granted to construct or operate any utility therein or to construct or operate therein any extension of or addition to any utility for which any permit, privilege, right or franchise may be required, except by the board of such district, except as to local ordinances governing the use of public streets, alleys, ways, and places. Every permit, privilege, right or franchise granted by any power district shall be subject to the condition prescribed in subsection (1) of this section with respect to purchase, acquisition and taking by the proper district and shall be an indeterminate permit subject to the terms and conditions of this chapter and of section 196.50."

Section 198.17 states "the manner provided in this chapter" in which the district may acquire existing utilities operating therein. Upon a two-thirds vote of the directors the clerk is instructed to notify the owner that the district proposes to acquire its system. If the owner is willing to enter into negotiations he notifies the district, and if the contract can be agreed upon it is then submitted to the Railroad Commission for its approval which can only be given after a public hearing. If, however, the owner is unwilling to sell, or the price cannot be agreed upon or if the Commission disapproves "and if the owner shall have consented in any manner provided by law to the purchase of such utility by the public or any municipality, the commission and the parties shall proceed to determine the just compensation to be paid by the district to the owner of such property therefor and to accomplish the transfer of the possession and ownership thereof to the district in the manner provided by Sections 197.05 to 197.09, and the commission shall certify to the district and to the owner . . . the amount of such compensation to be so paid, and the directors shall provide for and authorize payment of the same to the parties entitled thereto".

Sections 197.05 to 197.09 provide for the determination of the amount of compensation. The determination is made by the Railroad Commission at a public hearing, and gives the owner of the utility or its creditors a right to an appeal.

The italicized part of the statute relieves the district from establishing in a court of law "the necessity" for the taking, and hence the amount taken is not necessarily limited to the property used and useful in setting up the public plant or system.48

In case the owner is not "bound to consent to the purchase by the public", which would be very rare in a state that has had an indeterminate permit law for thirty years, it is incumbent upon the district to prove the necessity of the taking. 40 The statute provides for a trial in the Circuit Court before a jury if demanded by the utility. If the district wins the case the amount of compensation is determined in the manner above described. The statute also provides that the municipalities may, with the consent of the district, acquire the system for the district. The method of procedure is the same as if the district acquired the system. The city could only act after a favorable referendum.

The district is authorized to acquire municipal plants if both parties agree; if not, then in the same manner provided for acquisition of a privately owned utility. In either event the district must first secure a certificate of necessity and convenience.

Acquisition of part of a utility is authorized in the same manner as the acquisition of the entire system, except prior to the resolution of the district board the Commission must determine that the acquisition will be to the economic advantage of the district; that the public service will be continued as well as if the district acquired the whole plant or system; and the acquisition will not leave the owner incapacitated from carrying out its public duty. The district is given the power to levy an ad valorem tax on property. It in return must pay taxes at the same rate as a public utility, privately owned. The district is subject to regulation by the Railroad Commission just as a privately owned public utility.

Bonds can be issued "to purchase any permanent property for the district, to refund any valid, subsisting bonded debt of the district and for the purpose of paying and discharging any plant mortgage certificates, or purchasing and retiring any bonds . . . secured by any mortgage or deed of trust upon property acquired by the district". A bond issue must be authorized by a referendum, and the amount is limited to five per cent of the assessed valuation of the district. "Bonds of the district shall be incontestable, except upon constitutional grounds," 50 from and

40 However, it is possible that some utility had a long-term franchise prior to the enactment of the law. The rule in the federal courts seems to be that a franchise to occupy the streets is a property right in perpetuity, "unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant, or by some prior adjudication by the state courts to the contrary." Note (1919) 2 A. L. R. 1122.

50 The only limitation set forth in the Wisconsin Constitution is the one on the amount of indebtedness, which is five per cent of the assessed valuation.
after thirty days from the date of their issuance, and the substance of this provision shall be stated upon the face of each bond.”

The statute contains this interesting provision:

“Any provision of this chapter may be altered, amended or repealed at any time by the legislature, but no amendment or alteration thereof shall ever be enacted which shall release any district organized thereunder from any liability which it shall incur for the acquisition of property or for obtaining funds for the purposes of the district. The guarantees of this section shall be deemed and held to inhere in and become part of every contract authorized by said sections and entered into by any district thereunder.”

This section doubtlessly inspired the similar sections which we have noticed in State Rural Electrification Authority Acts.

The statute also authorizes any municipality within the district to lend money to the district for preliminary expenses in organization and administration. The Act provides for the offices of general manager, clerk, treasurer and attorney and defines their duties. It authorizes the district to obtain advice or information from the Railroad Commission and pay the expenses of the latter in furnishing the same.

Since the enactment of the Wisconsin Municipal Power District Act, Alabama, 51 Mississippi, 52 Nevada, 53 South Dakota, 54 and Tennessee 55 have enacted “The Power District Law”. Each of these Acts expressly creates municipal corporations except Mississippi. Paradoxically, the Mississippi Act resembles the Wisconsin Act more than the others, yet it is not a municipal corporation. The districts created by that Act have no power to pass police ordinances, or levy taxes. Evidently the legislature did not regard them as municipal corporations because it did not limit bond issues to a referendum as has long been its practice. 56 The chief resemblances between the Mississippi Act and the Wisconsin Act are in the creation of the districts by referendum, division into subdistricts, and appointment of directors by municipalities. The Mississippi Act does not provide for a report from the Public Service Commission. This change was due no doubt to the fact that the Public Service Commission of Mississippi never had jurisdiction over electrical utilities and hence would be in no

52 H. B. No. 576, Laws 1936, effective March 26, 1936.
56 MISS. CODE (1930) § 2484.
position to give advice. On the subject of acquisition of public utilities, Mississippi never having had the indeterminate permit law, the Act provided for acquisition by eminent domain, with immediate possession upon the district posting a bond. After the district has been created, the board of directors is given plenary authority to exercise the powers vested in the district without resort having to be made to the people, or any state agency. The Mississippi district, territorily, "shall be coterminous with the boundaries of one or more election units, which need not be contiguous but which shall be not more distant from one another than twenty miles . . . "

It is organized "for the purpose of conducting and operating a utility, and to carry out such purpose shall have power and authority to acquire, construct, reconstruct, operate, maintain, extend or improve any utility within or without the district, and to furnish, deliver and sell to the public and to any municipality and to the state and any public institution heat, light and power service and any other service, commodity or facility which may be produced or furnished in connection therewith ".

The general and specific powers are couched in language very similar to that of the Mississippi Rural Electrification Authority Act. This is true of the provisions for issuance of bonds, and rights and remedies of the bondholders. The Mississippi Power District Act, however, omits the "agreement of the State" with the bondholders. Like the State Rural Electrification Act, the Power Act provides that any surplus shall be used for the reduction of rates; for taxation to the same extent as privately owned utilities; that the Act is complete within itself, and the separability clause. Unlike the State Rural Electrification Act the Power District Act provides for the offices of general manager, secretary, and treasurer and prescribes their duties. Like the Wisconsin Act this Act provides for loans by any municipality to the district for the preliminary organization and administration expenses.

Alabama, Nevada, South Dakota, and Tennessee have adopted "Power District Acts" which are almost identical and closely akin to the Power District Acts above described. The chief difference is in their creation. The latter Acts do not provide for a referendum on that subject, and the part played by the Public Service Commission is different from that prescribed in the Wisconsin Act. The territorial limits are defined by the Public

57 Except in the case of Tennessee which has defined the term "Commission" to mean the State Rural Electrification Authority.
Service Commission. The district is not divided into subdistricts and the directors are appointed by the governor. 58

The last group of Acts contain a declaration of policy, declaring the necessity of cheap and abundant electricity in rural districts, and the need to create employment. This section was probably enacted with a view of dispensing with the proof of public necessity in eminent domain proceedings which the Acts later provide for. These Acts declare the corporate purpose in language identical with the Mississippi Act. It will be noticed that "A district . . . shall have power and authority to acquire . . . any utility within or without the district . . . " What is meant by "utility"? These Acts, and the Mississippi Act, define that term thus:

"'Public utility' or 'utility' means the plant, works, system facilities or properties together with all parts thereof and appurtenances thereto, including contract rights, used and useful primarily for the production, transmission or distribution of electric energy to or for the public for any purpose ".

These latter Acts provide three methods of initiating proceedings for organization. First, upon the vote of the municipalities or any one of them within the proposed district, 59 second, the Commission may of its own motion, and third, ten per cent of the voters of the proposed district may petition the Commission. In any event the Commission shall set a hearing and make a finding of fact of (1) whether public necessity and convenience require the creation of the district, and (2) whether the creation of the power district is economically sound and desirable or not. No appeal is provided for and none should be granted as the Acts contain provisions to the effect that the Act is complete within itself. These Acts put squarely up to the Commissions the responsibility of creating power districts and securing for the people of their State cheap electricity, and their share of Federal funds which have been made available under the Federal Rural Electrification Administration, and other federal agencies. After the district has been created the Commission loses control over it completely, except as to dissolution. The Acts specifically provide that the directors shall have the power "to fix, maintain and collect rates and charges for any service". The Tennessee Act specifically exempts its districts from regulation by its Public Service Commission. That provision is surplusage. The Alabama Act contains a provision similar to the one in its State Rural

58 Except in Nevada the directors are appointed by the county board in which the district is located.
59 The only method in Alabama; the two other methods were omitted from the statute.
Electrification Authority Act which makes all bond issues subject to the approval of the Public Works Administration, if it is in existence, and if not by the Public Service Commission after a public hearing. But since its District Act contains the clause making the Act complete within itself, the danger of an appeal "by some one who feels himself aggrieved" which exists in the State Rural Electrification Authority Act has been eliminated.

The "general powers" clause of these Acts, including the Mississippi Act, is similar to the one in the State Rural Electrification Authority Acts. "The specific powers" contain substantially the same provisions as found in the State Rural Electrification Authority Acts. The same is true of the provisions for the issuance of bonds, and rights and remedies of bondholders. The "agreement of the State" with the bondholders has been omitted. The districts are given the power to secure information by subpoenaing witnesses and papers and examination of witnesses under oath.

These latter Acts do not create any office except that of directors. In that respect they resemble the State Rural Electrification Authority Acts. Like the Mississippi and Wisconsin Acts they authorize any municipality within the district to loan money for the preliminary organization and administration expenses. They do not have power to levy and collect taxes. The Tennessee Act contains a section on eminent domain which is similar to the one in its State Rural Electrification Authority Act.

The Mississippi and Tennessee Acts contain this specific power:

"To contract with any person, municipality, the United States of America, the President of the United States of America, Tennessee Valley Authority, the Federal Emergency Administrator of Public Works and any and all other authorities, agencies, and instrumentalities of the United States of America, and in connection with any such contract to stipulate and agree to such covenants, terms and conditions as the Board may deem appropriate including, but without limitation, covenants, terms and conditions with respect to the resale rates, financial and accounting methods, services, operation and maintenance practices, and the manner of disposing of the revenues of the utility operated and maintained by the district."

Alabama by a separate statute 60 enacted the quoted part and made it applicable to "any Municipal Corporation, County, City, Town, Power District or Improvement Authority". This statute further provided that it was cumulative and not a limitation upon any power previously granted and that the Act should be liberally construed.

It is hard to see the wisdom of making the Power Districts municipalities when they are given practically none of the advantages and are subjected to several handicaps. In most states there are constitutional provisions dealing with municipalities which will have to be reckoned with.

**The Improvement Authorities Laws**

In 1935 Alabama 61 and South Dakota 62 enacted “The Improvement Authorities Law”. This law permits any city or village 63 to create an authority for the purpose “of conducting and developing the enterprise in which it may engage in such manner that the services afforded for such enterprise shall be available for public use and to all inhabitants of the municipality and the surrounding area for domestic and industrial uses at the lowest cost consistent with sound economy and prudent management”. The word “enterprise” is defined as the “business, undertaking or enterprise of furnishing services”. “Services” are defined as “any one or more of the following: water, sewerage, telephone, gas or electric heat, light, or power services, commodities or facilities”.

The Acts provide that such authorities may be formed to engage in any one or more of the above services. The process of creation begins by a petition of five per cent of the voters which is submitted to the city clerk.64 The Alabama Act provides that any objection to the petition is waived unless it is contested “summarily” in the circuit court within ten days. That is a wise provision because any error can easily be amended or a new petition circulated before the election is held. The city 65 submits the question to the voters. If the proposal is carried, the city so declares by resolution at which time the Authority becomes a public corporation “with power of perpetual succession”. However, the resolution must be filed with the Secretary of State. In South Dakota the authority first sees the light when the

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63 The Alabama Act includes any incorporated city or town and any area containing not less than 250 qualified electors. The South Dakota Act provides, “The term ‘territory’ shall mean the geographical area co-terminous with the boundaries of a city or town containing a population of not less than five hundred.”
64 In Alabama, in case the petition is by the electors of an unincorporated area, the petition would be submitted to the Probate Judge.
65 In Alabama, in case of unincorporated territory, the election would be submitted by the county.
resolution is filed. These authorities are public corporations but are not municipal corporations. They have no power to tax or pass police regulations. They do have power to secure information by subpoena of witnesses and papers and examination of witnesses under oath. The directors are appointed by the governing body of the city.\textsuperscript{66} The power of removal for cause is vested in the governor in South Dakota and in the appointing power in Alabama.

The authority can only engage in the service named in the petition for referendum and no other service can be added unless there is a new petition and a new referendum. There can be only one authority in a municipality. The authority can not render service to the inhabitants of another municipality unless the city consents thereto. In South Dakota the authority may extend its service ten miles beyond the city limits; in Alabama, twenty-five miles. The services undertaken by the authority can not be diminished unless all indebtedness is paid or at least seventy-five per cent of the bondholders consent thereto, and the same is true as to enlarging services.

The general grant of power reads:

"Every authority incorporated under this act is hereby invested with all powers necessary and requisite for the accomplishment of such purposes for which such authority is incorporated capable of being delegated by the legislature of the state. The authority shall have the power to acquire, construct, reconstruct, extend, improve and maintain and operate any plant, works, system, facilities or properties together with all parts thereof and appurtenances thereto, used or useful for the generation, production, transmission and distribution of electric energy, natural or artificial gas or mixture thereof, for obtaining a water supply, and the storage and distribution of water, for the collection, disposal, and treatment of sewerage, telephone system and services, and generally for the conduct and development of the enterprise. No enumeration of particular powers hereby granted shall be construed to impair any general grant of power herein contained, or to limit any such grant to a power or powers of the same class or classes as those so enumerated. The authority is empowered to do all acts necessary, proper, or convenient in the exercise of the powers granted under this act."

The grant of specific powers is quite similar to that of the State Rural Electrification Authority. In both states the authorities fix their rates and are not subject to the jurisdiction of the public service commissions. They have the power of eminent

\textsuperscript{66} In Alabama, in case of an unincorporated area, the county board would appoint, unless the territory was in more than one county, in which case the Governor would appoint.
domain. The provisions relating to the issuance of bonds, rights and remedies of bondholders, and the agreement of the state are similar to those in the State Rural Electrification Authority Acts. In Alabama, it will be recalled, such bonds could not be issued without the consent of the Public Works Administration, and in case of its non-existence the approval of the Public Service Commission was necessary. This can only be granted after a public hearing at the authority's expense. However, the Improvement Authority Act contains a clause making the Act complete within itself. That should eliminate the possibility of a long-drawn-out appeal by some person who feels himself aggrieved by the Commission's ruling.

In case the city is engaged in the service for which the Improvement Authority is incorporated the authority gets all the property, plant, rights and franchises, including the officers and employees. Of course, the city may still owe for the plant and in that case the following provision is made:

"The obligations of contracts of the municipality shall not be impaired by this act. Moneys to provide for the payment of notes, bonds or other obligations issued by the municipality in relation to any plant or system, the management, supervision, possession and control of which shall devolve upon such authority, shall be raised, collected and paid for by such municipality as though this law had not been enacted, except in the event such . . . obligations constitute (an) . . . encumbrance upon the revenues of such plant or system, the duty to raise, collect and apply such revenues to the payments of such . . . obligations shall rest upon such authority rather than upon the municipality and such . . . obligations shall remain (an) . . . encumbrance upon such revenues. All contracts of such municipality in relation to any such plant or system shall be assumed by such authority and the terms and conditions to be performed on the part of such municipality shall be complied with and performed by the board of trustees of such authority and the benefits of such contracts shall inure to the benefit of such authority."

This statute gives the municipalities the benefit of a public corporation which has all the power that the legislature can delegate to it. As in other authorities, they have as much flexibility as any private corporation. The Act in effect confers extra power upon the municipality without the danger of unfavorable judicial interpretation. If the power had been conferred directly, the result would have been years of litigation on such questions as whether this provision conflicted with some one of a thousand sections usually on the statute books and constitutional prohibitions applicable to municipalities.
Electric Membership Corporation Acts

These Acts provide for cooperatives. Six States, Alabama,67 Mississippi,68 Indiana,69 Tennessee,70 North Carolina,71 and Virginia,72 have recently passed comprehensive acts providing for such non-profit corporations. Every state has, and has had for years, statutes authorizing non-profit corporations and cooperative societies. The Electric Membership corporation acts differ in that they have the right of eminent domain, and the privilege to use the public highways and streets. The purpose of these corporations is "to promote and encourage the fullest possible use of electric energy by making electric energy available at the lowest cost consistent with sound economy and prudent management of the business of such corporations." 73 Any group (the number varying under the different Acts) may form one of these corporations by filing a certificate of incorporation in a manner similar to the creation of private corporations.74

68 H. B. No. 578, Laws 1936, effective March 26, 1936.
72 S. B. No. 251, Laws 1936, approved March 30, 1936.
73 Indiana limits such corporations to "inhabitants of rural areas", but the term "rural areas" is not defined. North Carolina limits these corporations to persons "residing in the community not served, or inadequately served, with electrical energy." The phrase "inadequately served" would seem to be an invitation for litigation. But the next section reads: "Whenever any such application is made by as many as five members of the community, the North Carolina Rural Electrification Authority shall cause a survey of said territory to be made and if, in its opinion, the proposal is feasible, shall issue to said community a privilege for the formation of a corporation as hereinafter set out." Since the Act is complete within itself, as is also the Rural Electrification Authority Act, and no appeal is provided for in either, it would seem that the matter could be carried no further.
74 In North Carolina the corporation does not come into being until approved by the Rural Electrification Authority. In Indiana the incorporators (at least eleven) must secure a certificate of necessity and convenience from the Public Service Commission. This is a prerequisite to organization and operation. Section 22 of the Indiana Act provides that "any person feeling aggrieved with any decision of the Public Service Commission, made as in this act provided" shall have the right to appeal to the Circuit or Superior Court of Marion County, and from there to the Supreme Court. In Mississippi the incorporation is subject to the approval of the Governor.

The certificate of incorporation calls for the data usually called for in non-profit corporations. No time limit is fixed except in Mississippi, where the limit is ninety-nine years. None, except Virginia, provides for capital
The government of the corporations is vested in a board of directors elected by the members. In Indiana and North Carolina, the corporations are limited to service of the members only. The other four acts provide that in case a corporation acquired a system or line already devoted to public use that service shall continue, provided that non-members do not exceed forty-nine per cent of the number of members and that such persons shall be permitted to become members upon non-discriminatory terms. In all of the states, except Indiana, the corporation is allowed to commence business upon final organization.

Common to all of the Acts except in Virginia is the general grant of power, which reads:

"Each corporation formed under this Act is hereby vested with all power necessary or requisite for the accomplishment of its corporate purpose and capable of being delegated by the legislature of the state; and no enumeration of particular powers hereby granted shall be construed to impair any general grant of power herein contained, nor to limit any such grant to a power or powers of the same class or classes as those so enumerated."

The statutes give these corporations all the specific powers usually enjoyed by a private corporation. They are empowered stock, and the Virginia Act leaves the question to the incorporators. Each certificate must give a reasonable description of the territory in which the corporation expects to do business.

Under the Indiana statute the power of the board may be cut down in the articles of incorporation. In Virginia the power of the board to adopt by-laws must be authorized by the articles of incorporation or by resolution of the stockholders.

In that State the corporation may elect to become either a general or local district corporation. In the first case Section 21 provides:

"General district corporations may be organized either by groups, who are one-third of the heads of farm families in all the counties included, or by the directors, respectively, of an association of agricultural producers, the members of which are a corporation in nine-tenths of the counties named within the said general district's territorial limits, the county or regional stockholder corporations, within the state having as stockholders or members whose common stock is wholly or partly paid for by more than seventy-five thousand producers of agricultural products within the State of Indiana. General district corporations shall be for the purpose of wholesale or retail distribution of electric energy and service, equipment and supplies to other district corporations, to local district corporations, and to individuals. (b) Local district corporations shall not be permitted to exercise any of the powers granted under this Act until at least one-half of the rural residents of the territory described in the articles of incorporation proposed to be issued shall have subscribed to said articles and made a minimum payment for membership in such corporation as in said articles provided."

Mississippi omitted the phrase "capable of being delegated by the Legislature of the State."
"to make any and all contracts necessary and/or convenient for the full exercise of the powers in this Act granted, including, without limiting the generality of the foregoing, contracts with any person, federal agency, or municipality for the purchase or sale of energy; for the management and conduct of the business of the corporation, including the rates, fees or charges for service rendered by the corporation." 78 They are given power to acquire property, and the word "acquire" is defined to include any voluntary acquisition of property, the power to construct,79 and acquisition by eminent domain. In North Carolina, the Rural Electrification Authority exercises the power of eminent domain for the cooperatives, and also handles all transactions with the Federal Government. Tennessee provides for the condemnation of property already devoted to public use, which is probably surplusage as these corporations already have that power. The Tennessee Act contains the same unique provisions on condemnation proceedings which are also found in its State Rural Electrification Act. These corporations are authorized to use any public highway or street.80

78 The Mississippi and Tennessee Acts read:

"To make any and all contracts necessary or convenient for the full exercise of the powers in that Act granted, including, but not limited to, contracts with any person, federal agency or municipality for the purchase or sale of energy and/or the acquisition of all or any part of any system, and in connection with any such contract to stipulate and agree to such covenants, terms and conditions as the Board may deem appropriate, including covenants, terms and conditions with respect to the resale rates, financial and accounting methods, services, operation and maintenance practices and the manner of disposing of the revenues of the system operated and maintained by the corporation."

Indiana makes such contracts subject, "however, to the approval of the Public Service Commission as to all such rates, fees, or charges, in the same manner and to the same extent as is provided by law for the regulation of such rates, fees, or charges by public utilities."

The Virginia Act does not contain the above provision but does contain a provision reading:

"To perform any and all of the foregoing acts and to do any and all of the foregoing things under, through, or by means of its own officers, agents and employees, or by contracts with any person, federal agency or municipality."

This latter provision is also incorporated in the North Carolina Act.

79 North Carolina omits the word "construct" in the definition of "acquire"; Mississippi omits the power of eminent domain from the same term.

80 In Mississippi and Tennessee the use of highways and streets is subject to the consent of the local governments. In North Carolina such franchises are within the discretion of the Rural Electrification Authority and its decision is made final. This provision is omitted in the Virginia Act.
Mississippi and Virginia authorized their cooperatives to assist their members by loans to acquire electrical equipment. These corporations are authorized to issue bonds in anticipation of revenues. The board may make covenants to secure its obligations which "in the absolute discretion of the board, tend to make the obligations more marketable, notwithstanding that such covenants, agreements, acts and things may constitute limitations on the exercise of the powers herein granted." Mississippi and Tennessee provide that bonds may be issued for property; this clause is similar to the one in the State Rural Electrification Authority Acts. On the disposal of property the Acts provide:

"No corporation may sell, mortgage, lease or otherwise encumber or dispose of any of its property (other than merchandise) unless authorized so to do (a) by the vote of at least a majority [§ in Virginia] of its members and (b) with the consent in writing of the holders of 75% in amount of the obligations of such corporation then outstanding."

Alabama, Tennessee, Virginia, and Mississippi allow the directors to sell property which in their discretion is not necessary, provided the amount does not exceed ten per cent of the total per year.

Virginia subjects the cooperatives to the control of the Public Service Commission to the same extent as public utilities. Indiana and North Carolina give the Public Service Commissions jurisdiction over rates and charges. In the other Acts the Public Service Commissions are given no jurisdiction over any activity of the cooperative except over the issuance of bonds in Alabama. These cooperatives would not be public utilities at common law as they are not serving others for hire. They merely serve their own members. Statutes which allow service to non-members give them a remedy by allowing them to become members "on non-discriminatory terms".

81 The Alabama Act contains a provision making the issuance of bonds subject to the approval of the Board of Public Works. This provision is similar to the one in the State Rural Electrification Act. See criticism, note 35, supra.

82 Section 18 reads:

"Any cooperative organized under this Act shall be subject to the jurisdiction of the State Corporation Commission in the same manner and to the same extent as are other similar utilities under the laws of the State of Virginia."

By the word "similar" the Legislature evidently meant "public" utilities, because under specific powers the Act provides for the exercise of the right of eminent domain "as prescribed for other public service corporations by general law."

83 See note 81, supra.
North Carolina subjects the property of cooperatives to the same taxation as the property of counties and municipalities; Mississippi, as privately owned public utilities; in Indiana and Virginia the rates shall be sufficient "to pay any tax assessed". The other Acts are silent on the subject.

As to surplus funds, the Alabama and Tennessee Acts provide distribution "(1) in proportion to the gross operating revenues received from each, or (2) such return may be made by the way of a general reduction of rates to the members if the board so elects"; Mississippi: "by reimbursement of membership fees, or by way of general rate reductions"; Indiana: "according to the amount of energy consumed"; and Virginia: "according to the amount of revenue paid for energy".

GENERAL OBSERVATIONS

From this analysis of these various statutes what generalizations can be drawn? It is clear that the draftsmen have succeeded in creating a public corporation which is as flexible as a private corporation and yet as powerful as the state. Red tape and division of authority have been eliminated. Responsibility has been centered upon a board with few members.

The Federal Rural Electrification Administration is in one sense a revolving fund from which any rural authority can borrow at a low rate of interest. Although the Administrator is interested in making loans, he is equally interested under the law in seeing that the loans are repaid. The money which is repaid goes into the fund and is available to others. The states have very wisely authorized the authorities and power districts to make such covenants and agreements as will make the bonds more marketable although such covenants "may restrict or interfere with the powers herein granted". Thus the state authorities can give any reasonable covenant which the Federal Administrator deems necessary to make the loan secure. If the money is borrowed from the Public Works Administration, security is likewise required; and, in addition, covenants in regard to hours and labor. To off-set the latter the Public Works Administration donates part of the cost of the project. But even then federal courts have enjoined some of these loans and grants on the ground that the state statutes did not authorize the local government to give the covenants in regard to hours and wages.84 The

local governments in question had authority to borrow money; to build the project in question; to pay the wages in question and fix the hours that should constitute a day’s work, but yet under these decisions they could not give binding assurance to the Public Works Administration that they would do those things. The legislatures in conferring power to do them undoubtedly intended that officials could covenant to do them, but their failure to express what was clearly implied made possible a technical interpretation to the great misfortune of thousands of unemployed. These statutes have taken care of that situation.

At the recent meeting of the Association of American Law Schools the point was made that these authorities, power districts and cooperatives should be placed under the jurisdiction of the public service commissions. Such a provision would mean still-birth. These statutes carry with them no appropriations; no power to levy and collect taxes; the only source of revenue is borrowing. How could these agencies and cooperatives borrow and give a binding covenant to collect such rates as necessary to pay principal and interest if the determination of their rates was placed within the jurisdiction of the public service commissions? The answer is that the federal administrators would not be justified under the law in making the loans. Furthermore those making the suggestion lose sight of the history and purpose of the public service commissions. Their purpose was protection of the public against public utilities who had the benefit of a monopoly and whose sole object was to make a profit. The duty of the public utilities and their self-interest conflicted. That condition does not exist with the public authorities and cooperatives. They are not profit-seeking organizations. And that fact is reflected in their relations with the public.85

Why authorize municipal corporations to create improvement authorities? Why not merely enlarge the powers of the present municipal corporations? The first course is easier and simpler. To enlarge the powers of municipal corporations already in existence would mean the repeal and amendment of numerous statutes. That is a tedious job and gives room for frivolous objections and extended litigation. Perhaps, the principal reason is that many courts have held that municipal corporations have no implied powers except those which are “indispensable” to the

85 The public relations between some rural cooperatives and their members are such that the members read their own meters and send the readings to headquarters. See “Rural Electric Cooperatives Expanding Rapidly under R E A,” by W. Clarence Adams, (1937) 19 P. U. Fort. 161, 164.
exercise of a granted power. The authorities are not born in that unfriendly atmosphere, and because of the generous grants of power and the liberal language in which the powers have been embodied, the authorities might reasonably be held to have all power except that which is denied them.

Have these Acts by permitting such wide discretion in contracting, especially with federal agencies, gone beyond constitutional limits? Do the sum totals result in unwarranted delegation of state power to the Federal Government? These questions were raised and answered in the negative by the Supreme Court of Texas in the case of *Lower Colorado River Authority v. McGraw.*

The power of the legislature to create an authority to engage in the electric power business has been challenged. That challenge, as was to be expected, was met and answered in the case of *Clarke v. South Carolina Public Service Authority.* The South Carolina Supreme Court stated the power of the Legislature, thus:

". . . To the Legislature of South Carolina . . . is granted the legislative power by the Constitution of 1895. . . ."

"Our courts have held that by the use of this language the people of the state vested the General Assembly with the entire legislative power of the state, subject only to such restrictions upon and regulations of such power as were contained in the Constitution itself. It is the theory and intent of the Constitution of South Carolina that the powers vested in the General Assembly include all powers not specifically reserved by the Constitution. . . ."

"This is well declared by Mr. Justice Stabler . . . in the following language: . . . 'It has always been, and is now, the law that the General Assembly may enact any act it desires to pass, if such legislation is not expressly prohibited by the Constitution of this state or the Constitution of the United States. . . .'"

The question was also raised in the *Clarke* case whether the loan made by the Public Works Administration would create a debt of the state in violation of the state constitution which prohibited the creation of a debt unless authorized by a vote of the people. The Act clearly provided that the bonds of the Authority should not be debts of the state or of any political subdivision. The loan was secured by a pledge of the revenues and a mortgage on the property, all of which was to be obtained from the proceeds of the loan. The Court held that the loan would not create an indebtedness of the state. In this the Court was

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86 125 Tex. 268, 83 S. W. (2d) 629 (1935).
in accord with the decisions in other jurisdictions. The decisions on this subject were well summarized in the case of Farmer's State Bank v. City of Conrad, which reads:

“A summary of all of the numerous decisions relating to the questions involved here leads to the following conclusion: (a) That a contract to purchase property by a municipality does not give rise to an indebtedness or liability within the meaning of the constitutional or statutory debt limitation where the purchase price is payable exclusively from income or profits to be derived from the property purchased; (b) where the property purchased is for improvements to a plant already owned by the municipality and the revenue of both the existing and of the additions or improvements purchased is pledged or set aside for the payment of the purchase of the latter, doubt has been expressed as to whether or not an indebtedness is incurred. The weight of authority, however, supports the view that such transaction does not create a debt or liability where no mortgage or lien is placed on existing property of the city, but it is otherwise where a mortgage or lien is imposed upon property already owned by the municipality, or upon other property in addition to that purchased. The weight of authority also is that the mortgaging of property purchased to the party to whom it is purchased is not a violation of the debt limitation provisions.”

In reading the decisions questioning the validity of these Acts one is impressed by the frivolous objections urged by counsel. In the Clarke case the objection was raised that the Authority was not subjected to the jurisdiction of the Public Service Commission; that the amount of taxable property in the State would be diminished; that the Authority would compete with private utilities; that the Act authorized the Authority to sell electricity beyond the bounds of the state; and that the Act permitted expenditure of funds from the governor's contingent fund to pay traveling expenses of the directors. Perhaps, the prize objection was raised in the case of State ex rel Normile v. Cooney:

“It is urged that section 5 of article 10 of the Constitution is violated; it reads as follows: 'The several counties of the state shall provide as may be prescribed by law for those inhabitants who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society.' If it may be said that in some manner the inhabitants of the several counties who have claims upon the sympathy and aid of society are by these acts assisted, relators' argument is foreclosed by our decision in the case of Mills v. State Board of Equalization. . .”

The case failed to state whether the relators fell in that group or not.

88 See note (1931) 72 A. L. R. 687.
89 100 Mont. 415, 47 P. (2d) 853, 859 (1935).
90 100 Mont. 391, 47 P. (2d) 637, 646 (1935).
One constitutional question upon which a clear decision of the Supreme Court is still lacking is the power of the Federal Government to make the loans contemplated by these authorities. In Greenwood County, S. C. v. Duke Power Company, the Power Company had sought and obtained an injunction in the District Court against Greenwood County and the members of its finance board, forbidding them to construct an electric power plant at Buzzard Roost on the Saluda River, and forbidding them to obtain a loan from the Federal Public Works Administration for the purpose of constructing it. Judge Parker, in reversing the decree of the district court, dealt with the question at some length. He said:

"In the light of our history it is idle to say that, in the presence of such a situation as confronted Congress, [the nationwide unemployment] the national government must stand by and do nothing for the relief of the general distress, confining its activities to matters as to which it is given legislative powers by the Constitution. It is the only instrumentality which the people of the country have which can deal adequately with an economic crisis nationwide in scope; and there can be no question but that, for the purpose of dealing with such a crisis, it can exercise the power to raise and spend money under article 1, section 8, clause 1 of the Constitution, which provides: 'The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defense and the general Welfare of the United States.'" 92

Judge Parker then referred to the decision of the Supreme Court of the United States in the case of United States v. Butler in which Mr. Justice Roberts adopted the Hamiltonian view of the meaning of the "general welfare clause", saying, "The power of Congress to authorize the expenditure of public moneys for public purposes is not limited by the direct grant of legislative power found in the Constitution". That opinion of the Supreme Court was handed down January 6, 1936. Judge Parker's opinion came on February 22. He was naturally unable to anticipate that in Carter v. Carter Coal Company, decided on May 18, the Supreme Court speaking through Mr. Justice Sutherland, would take a position which left in doubt once more the true meaning of the General Welfare Clause. 95

It must be conceded, however, that whatever doubts have been raised by Carter v. Carter Coal Company as to the interpretation

91 81 F. (2d) 986 (C. C. A. 4th, 1936).
92 81 F. (2d) 986, 993 (C. C. A. 4th, 1936).
93 297 U. S. 1 (1936).
94 298 U. S. 238 (1936).
95 298 U. S. 238, 290, 291 (1936).
of the general welfare clause in future cases, that decision did not expressly extend to cases where Congress exercises its spending power, but simply asserted generally the doctrine that the Federal Government has no powers not enumerated in the Constitution, and that there is no power in Congress to legislate in the general welfare except by virtue of the powers expressly given or given by necessary implication. It may well be doubted, therefore, whether the Court would approve the statement of Judge Parker 96 that if "the relief of nation-wide unemployment be a legitimate end for Congress to have in view in the exercise of its power to raise and spend money under the 'general welfare' clause, the construction of a nation-wide program of public works would seem to be a legitimate means to that end."

This makes all the more unfortunate the failure of the Supreme Court to pass upon the merits of the case when Duke Power Company v. Greenwood County 97 was the subject of a per curiam opinion on December 14, on writ of certiorari to the Circuit Court of Appeals. The case had been twice before the Circuit Court of Appeals. Shortly before the first time, the contract under which Greenwood County and the Federal Government were to operate had been modified to meet the objections of the District Court. The Circuit Court of Appeals thereupon remanded the case to the District Court, which considered and denied the application of the defendant Ickes to vacate the decree enjoining the county, in the light of the new contract. Thereupon the case was taken again to the Circuit Court of Appeals and Judge Parker gave the opinion from which we have quoted above. Acting upon the theory that the memorandum decision should have required the District Court to vacate the original decree, which was what the defendant Ickes asked for but was unable to get, so that the whole proceedings might be begun anew, the Supreme Court took occasion to castigate both the Circuit Court of Appeals and the District Court for irregularity in its proceedings. It would seem that the criticism, if any was called for, should have been directed at the attorneys for the Power Company. In any case, important substantive questions were left undecided, because of the view of the Court that "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced."

97 299 U. S. 259 (1936).
98 Id. at 268. (Italics the author's.)
INCOME TAX EVASION AND AVOIDANCE:
SOME GENERAL CONSIDERATIONS †
LUCIUS A. BUCK *

I
INTRODUCTION

AT THE OUTSET it is desirable to make clear that this article will not attempt to define either evasion or avoidance, or to draw the line of distinction between the two terms. It is the purpose of this paper to review the history and the development of the two doctrines that now govern, in broad outline, this subject. It is hoped that in this way the problem of the taxpayer, Government, and Court may be presented as clearly as the state of the law will permit. It is believed that much confusion exists by reason of a failure to define the problem.

Perhaps the terms are unscientific. Certainly they have proven unsatisfactory. They hardly do more than present the problem. If the Government attacks an arrangement whereby a taxpayer has sought to minimize his tax liability it generally charges that the plan is one of evasion; the taxpayer counters that he has acted within the law and has merely sought to avoid the tax liability. Thus, the problem is presented: Is the method by which this taxpayer has sought to minimize his taxes within the law? The courts must answer. If it be held that the taxpayer has acted within the law, the court says that he has avoided the tax; if it be held that the arrangement is without the law, the court says that the plan is one of evasion. As one court has said: "To describe its various phases as evasion rather than avoidance seems to us to use the language of the ultimately victorious contestant rather than to speak as an impartial observer." 1 The best that can be done is to adhere to the rules or guides which the courts have given us in the solution of each individual case.

The problem is an ancient one.2 The natural desire of the citizen to pay as small a tax as possible is doubtless as old as

† The views herein expressed are the private views of the author and are not intended to represent the official position of the Department of Justice.


taxation. It would be difficult, indeed, to devise a system of taxation under which it would not rear its head. In this day of manifold governmental activities with the consequent need for constant and fixed revenues, it is of paramount importance that the revenue laws be so drawn and so administered that the taxes imposed do not depend for their collection upon the whim, caprice, or astuteness of taxpayers and their counsels. An added consideration is the equitable rights of taxpayers themselves. It is of abiding importance to taxpayers as a class that each taxpayer pay his just proportion of the tax burden, that each citizen share the cost of government in accordance with his ability to pay. Hence, in combating both evasion and avoidance, the Government is protecting itself and the equitable rights of all taxpayers. The problem is one in which small taxpayers, in particular, have a very definite interest. John Doe has a taxable net income of one thousand dollars. Generally John Doe pays his tax thereon. If he tries to avoid he usually evades, because he is unable to employ skilled advisers, and many of the methods by which he might avoid are not available to him. On the other hand, Henry Doe has a taxable net income of three hundred thousand dollars. He has skilled accountants and advisers to reduce this net income and thereby minimize his tax liability. His business and investments are, generally, of such a nature as to render available to him many tax saving schemes. Hence, the ability to pay frequently carries with it the ability to avoid. After all, tax avoidance cannot be had at the dollar book counter.

Under the income tax laws the problem has appeared in many forms. At nearly every session the Congress is called upon to close the gates upon some new strategy designed by able counsel for taxpayers. This paper is not concerned with the methods

3 See Snyder v. Routzahn, 55 F. (2d) 396, 397 (N. D. Ohio, 1931).
5 See 5 PAUL & MENTENS, LAW OF FEDERAL INCOME TAXATION (1934) 853.
6 See, as treating of some of the methods, the author's article, Income Tax Evasion and Avoidance: The Deflection of Income (1936-37) 23 VA. L. REV. 107, 265.
7 Consider for example: (1) The development of the Wash Sale Provision—Sections 24 (a) (6) and 118, 49 STAT. 1662, 1692, 26 U. S. C. A. §§ 24, 118 (Supp. 1936), 48 STAT. 683, 691, 715, 26 U. S. C. §§ 1, 24, 118 (1934); Section 118, 47 STAT. 208 (1932), 45 STAT. 826 (1928); Section 24 (a) (5), 44 STAT. 26 (1926), 43 STAT. 270 (1924), 42 STAT. 24 (1921). (2) Section 45, 49 STAT. 1667, 26 U. S. C. A. § 45 (Supp. 1936), for the history of which see note 12, infra. (3) The Undistributed Surplus Tax Provisions of the 1936 Revenue Act.
which have been used, or which are available for use, but with the general rules and guides for determining whether a given method is within the law or transgresses upon forbidden ground.

II

THE LACK OF DEFINITIONS

The terms evasion and avoidance are in general lay use and are generally listed as synonymous 8 ones, even in law dictionaries.9 But obviously they are not to be treated as synonyms in the law of income taxation. It is well recognized that a taxpayer may legally avoid the tax burden; it is as equally well recognized that evasion is illegal.

Attention is first invited to the fact that although the term "evade" is used in several sections of the revenue acts, there is no statutory definition. On the criminal side, a person who willfully attempts in any manner to evade or defeat any tax imposed by the income tax title is declared to be guilty of a felony,10 but this statute does not attempt to define the word "evade". On the civil side, there is an addition to the tax imposed where "any part" of a deficiency "is due to fraud with intent to evade tax".11 Here, again, no statutory definition of

8 STANDARD DICTIONARY; WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE.

9 In BLACK'S LAW DICTIONARY (2d ed. 1910) 109, the term "avoidance" is defined as follows: "Avoidance: A making void, or of no effect; annulling, cancelling; escaping or evading." The term "evasion" is defined, at 445, as follows: "Evasion: A subtle endeavor to set aside truth or to escape the punishment of the law." Neither of these is a true definition. The first deals in terms of effect; the second is a description of method.


the term "evade" is given. On the administrative side, the Commissioner is vested with discretionary power to distribute, apportion, or allocate gross income or deductions among organizations, trades, or businesses having common ownership or control if he find such to be "... necessary in order to prevent evasion of taxes or clearly to reflect the income..." 12 This statute does not contain a definition of evasion, but the committee reports define the term as including "... the shifting of profits, the making of fictitious sales, and other methods frequently adopted for the purpose of 'milking'." 13 It is obvious, however, that this is not a general definition of the term "evasion", but merely an enumeration of the badges of evasion in a particular situation under a specific statute. In speaking of the term "evasion" as used in this statute, one court has said: 14 "The term 'evasion of taxes' is broad enough to include the avoidance for realization for taxation of such a profit through its transfer to another branch of the same business enterprise in a way which only changes its place in the business set up." For this situation, the definition, while general, is adequate.

In several deduction cases the Government has sought to have the courts hold that any transaction, not germane to the venture in hand, having as its purpose the creation or establishment of a deductible loss, should be considered evasion.15 The courts have never stated the rule in this way; 16 although several courts have indicated that a transaction wholly lacking in any business purpose and having no purpose other than the tax purpose is a scheme of evasion.17 This would seem to be substantially correct and

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the holdings in a number of cases have rejected the effectiveness of intermediate non-germane steps introduced into business transactions for tax purposes,18 although it must be remembered that the Circuit Court of Appeals for the Second Circuit stoutly insists that the tax purpose is "legally neutral".19

In the Asiatic Petroleum Co. case, the taxpayer contended "that 'avoidance' connotes escape from taxation by avoidance of the receipt of income, while 'evasion' connotes an effort to escape taxation by one who has received taxable income, and is conduct criminally punishable." 20 This definition the court rejected. Possibly the nearest approach to a definition of general application is that of Mr. Justice Holmes in Bullin v. Wisconsin,21 where he said: "When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law." Beyond this statement, it is perhaps undesirable that a hard and fast definition should be formulated. To give a rigid definition of "evasion of taxes" would merely serve to promote evasion by telling the cunning how to escape. The same considerations which prevent the courts from defining fraud are present here,22 although a statement by the courts of the badges or elements of evasion might be useful.

18 S. A. MacQueen Co. v. Commissioner, 67 F. (2d) 857 (C. C. A. 3d, 1933); Hellebush v. Commissioner, 65 F. (2d) 902 (C. C. A. 6th, 1933); Burnet v. Lexington Ice & Coal Co., 62 F. (2d) 906 (C. C. A. 4th, 1933); Taylor Oil & Gas Co. v. Commissioner, 47 F. (2d) 108 (C. C. A. 5th, 1931). See also, McInerney v. Commissioner, 82 F. (2d) 665 (C. C. A. 6th, 1936). In this latter case the taxpayer purported to make a gift of a one-half interest in certain property to his wife. All of the usual and proper papers to effect this result were signed. Two or three days subsequent thereto the taxpayer and his wife joined in conveying the property to a purchaser with whom the taxpayer had negotiated the terms of the sale prior to the conveyance to his wife. The court held that the taxpayer (husband) was taxable on the entire gain. The court pointed out, at 668: (1) "At the time the claimed gift was made, every arrangement had been completed for the sale"; (2) "The sale was carried out precisely as arranged, with the wife joining in the execution of all necessary documents"; (3) "Under the circumstances it appears that it was not the intention of the petitioner that his wife should have any real interest in this property"; (4) "A continuing intention existed to effect the sale, and the transfer to the wife was a mere incident"; and, (5) "The gift was a gift of an interest in the profits and does not relieve the petitioner of tax liability."


21 240 U. S. 625, 630 (1916).

III

THE DOCTRINE OF THE ISHAM CASE

The doctrine of the Isham case is of preeminent importance in the law of tax evasion and avoidance. That case involved a criminal prosecution for evasion of a stamp tax imposed upon promissory notes. The court held that the instruments were not, on their face, promissory notes and that other evidence was not admissible, since the tax was imposed upon the form of such instruments. The decision is rested upon two principles: (1) The taxability of an instrument, as well as the amount of the tax, is determined by the form and face of the instrument; (2) Where doubt exists as to the taxability of a given type of instrument, that doubt must be resolved, as a matter of construction, against the Government because "a tax cannot be imposed without clear and express words for that purpose". To the Government's objection that the device used was one "to avoid the payment of a stamp duty", the court gave two answers: (1) "... if the device is carried out by the means of legal forms, it is subject to no legal censure"; (2) "... the adoption of a rule that the form of the instrument can be disregarded, and its real character be investigated for the purpose of determining the stamp duty, would produce difficulties and inconveniences vastly more injurious than that complained of." Thus, the real holding in the case becomes clear: The stamp tax is imposed upon the form of instruments; a taxpayer may use some other form of instrument to avoid the tax; and, in the case of a stamp tax, avoidance is lawful if the forms adopted are legal. The word "form" seems to be the key word in this case.

It is very doubtful that the Court intended the Isham case to be given application to a tax other than one whereof form was the essence and the sole criterion. This doubt springs from an analysis of the opinion and is reinforced by two cases decided by the court a few years later. The first of these cases was Mitchell v. Commissioners. Under the laws of Kansas, all bank deposits existing on March 1st of each year were taxable. The taxpayer withdrew his deposit on February 28th, receiving the same in notes of the United States, which he placed in a package and left in the bank's vault. On March 3d, following, he withdrew the

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23 United States v. Isham, 17 Wall. 496 (U. S. 1873).
24 17 Wall. 496, 504 (U. S. 1873). The quoted language is that of Chief Baron Pollock in Girr v. Scudds, 11 Ex. 191 (1855).
25 17 Wall. 496, 506 (U. S. 1873).
26 91 U. S. 206 (1875).
package and deposited the notes to his general credit. Upon discovery of the facts, the tax officers of the State added the amount of the deposit to his taxable property. Over the taxpayer's protest, a tax was levied and collection was threatened. The taxpayer filed his bill to restrain the collection of the tax. The state courts dismissed the bill. The Supreme Court of the United States, in affirming the state courts, pointed out that "... a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a court of law." 27 It must be presumed that the difference in the attitude of the court toward tax evasion in this case and the Isham case was because of the difference in the type of tax. Certainly no other explanation suggests itself. 28

The second case is that of Shotwell v. Moore. 29 The facts were substantially the same as in Mitchell v. Commissioners, but the forum was one of law instead of one of equity. The court severely characterized the scheme as "a discreditable one" of "evasion"; 30 cited a number of state court cases holding that similar schemes did not defeat a tax otherwise due; 31 and assumed that the purpose to defeat the tax was illegal. 32 However, the Court did not rest its decision on the ground that the tax purpose rendered the

27 Id. at 208.
28 Under this case it would seem possible, in a suit against a collector for refund, for the Government to raise such a defense by equitable plea, which would be disposed of on the equity side of the court and in accordance with equitable principles.
29 129 U. S. 590 (1888).
30 The full quotation, at 596, is as follows: "It does not need the finding of the Court below as a fact to show that this was an evasion and a discreditable one, of the taxing laws of the State, if it could be made successful."
31 Holly Springs Savings and Ins. Co. v. Marshall County, 52 Miss. 281 (1876); Jones v. Seward County, 10 Neb. 154, 4 N. W. 946 (1880); Poppleton v. Yemhill County, 8 Ore. 337 (1880). In line with the foregoing cases are the following: Whiting Finance Co. v. Hopkins, 199 Cal. 428, 249 Pac. 853 (1926); Whiting Finance Co. v. Hopkins, 115 Cal. App. 756, 2 P. (2d) 461 (1931); Automobile Acceptance Corp. v. Hopkins, 121 Cal. App. 168, 8 P. (2d) 509 (1932); In re Peoples Bank of Vermont, 203 Ill. 300, 67 N. E. 777 (1903); Ransom v. City of Burlington, 111 Iowa 77, 82 N. W. 427 (1900); Dixon County v. Halstead, 23 Neb. 697, 37 N. W. 621 (1888); Fass v. Seehawer, 60 Wis. 525, 19 N. W. 523 (1884).
32 The court said, at 596: "It is, therefore, urged that on the ground alone—the illegal purpose for which the transactions were made in the bank—the court should hold the plaintiff in error liable to taxation for the amount thus converted."
transaction void, but held the taxpayer liable on the theory that the state statute laid the tax on the basis of the monthly average.\textsuperscript{33}

The result of the three cases seems to be about this: Under the \textit{Isham} case, a taxpayer may choose a nontaxable instead of a taxable form of instrument in order to avoid a stamp tax; under the \textit{Mitchell} case, the Court will not use its equity powers to protect a formalistic scheme for the evasion of a tax where substance is important; and, under \textit{Shotwell v. Moore} a formalistic scheme for the evasion of tax is severely characterized by a court of law, but is not held void on that ground.\textsuperscript{34} The court either repudiated the principle of the \textit{Isham} case, or considered that it applied only where form was of the essence in fixing the tax liability. Since only two years intervened between the \textit{Isham} and the \textit{Mitchell} cases, it is hardly likely that the Court intended to repudiate it by ignoring it; it is more reasonable to suppose that the Court did not consider the \textit{Isham} doctrine applicable where the inquiry related to substance rather than form.\textsuperscript{35}

\section*{III}

\textbf{THE DOCTRINE OF SUBSTANCE V. THE DOCTRINE OF THE IŞHAM CASE.}

As has been pointed out, the \textit{Isham} case holds that where a tax is imposed on the form of instruments, a taxpayer may avoid the tax by using a non-taxable form. It was thought that the nature of the income tax rendered the doctrine of the \textit{Isham} case inapplicable in this field. In the solution of problems arising under the income tax laws, the courts quickly adopted the principle that substance and not form, is the determinative element.\textsuperscript{36} It was said that regard will be had for "the very truth of the matter",\textsuperscript{37} and that the courts will fix "the character of the proceeding by what actually occurred."\textsuperscript{38}

\textsuperscript{33} The attitude of the court towards this type of scheme is apparent even in the dissenting opinion of Mr. Justice Bradley. He said, at 600: "I dissent from the judgment. I do not defend Mr. Shotwell; but it is a question of law, . . ."

\textsuperscript{34} The \textit{Isham} case is not referred to in either \textit{Mitchell v. Commissioners} or \textit{Shotwell v. Moore.}

\textsuperscript{35} The only change in the court between the \textit{Isham} and \textit{Mitchell} decisions was the filling of the vacancy in the post of Chief Justice; only three justices who sat on the \textit{Isham} case were on the Court at the time of the decision in \textit{Shotwell v. Moore.}

\textsuperscript{36} United States \textit{v.} Phellis, 257 U. S. 156, 158 (1921).

\textsuperscript{37} Eisen v. Macomber, 252 U. S. 182, 211 (1920); Weiss \textit{v.} Stearn, 265 U. S. 242, 253 (1924).

\textsuperscript{38} Gregory \textit{v.} Helvering, 293 U. S. 465, 469 (1935).
In *Weeks v. Sibley*, we find the beginning of the rule which now prevails in income tax litigation. There a joint stock association was dissolved and in its stead a trust was set up. The Government attacked the change of organization as having been made for tax purposes and for that reason void. The court held the change to be real and continuing and that "... the right to change the status of an organization, or to dissolve an organization in any legal manner, is not made ineffectual because the motive impelling the change is to reduce or avoid taxation in the future." In other words, a taxpayer can rearrange his business in any legal manner so as to escape, in whole or in part, a future tax liability which would have been incurred had the rearrangement not been made. It is unfortunate that a subsequent case in which the problem was considered should have imported into the income tax field the doctrine of the *Isham* case. In the *Iowa Bridge Co.* case, reliance was again placed on the *Isham* case.

Since these cases did not analyze or discuss the doctrine of the *Isham* case, it was natural that taxpayers should consider that form, rather than substance, was the determinative element in income tax evasion or avoidance cases. There seemed to be a head-on clash between the doctrine of substance and the doctrine of the *Isham* case. Obviously the Government was in a position where it had to attack the application of the latter doctrine and to seek a clarification. The best type of case for the attack was a deduction case, because the *Weeks* case relied in part upon the rule that a statute imposing a tax must be construed most favorably to a taxpayer, whereas a contrary rule is applicable to a statute granting deductions.

The attack was first made in the *Jones* case. In that case four brothers sold bonds to their wholly owned corporation and claimed

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40 *Id.* at 158. The plan or course of action pursued in this case had for its purpose valid business objectives substantial in nature and quite apart from the tax purpose.
41 Fraser v. Nauts, 8 F. (2d) 106 (N. D. Ohio, 1925).
45 71 F. (2d) 214, 217 (App. D. C. 1934), *cert. denied*, 293 U. S. 583 (1934). It is not here intended to give the impression that the writer thinks the *Jones* decision is wrong. The facts set forth in the latter part of the opinion necessitate the holding. The only criticism of the opinion is that the Court went too far on the question of public policy. In addition, the policy of the statute might have been considered rather than a broad and
a deductible loss thereon. The Government's argument was built around the theory that public policy is against the deduction of losses on transactions between stockholders of a close corporation and their corporation. The court upheld the deduction and relied upon the Isham and Iowa Bridge Co. cases. Again there was no analysis of the Isham case.

The next case in the chronological history of the conflict of these two doctrines is the Gregory \textsuperscript{46} case. By this time it seemed fairly certain that the doctrine of the Isham case had been imported into the law of income taxation, but the extent of that importation and the metamorphosis of the doctrine in transplantation were unknown. The Gregory case indicates an answer. In that case the court first took occasion to state that "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." \textsuperscript{47} As authority for this proposition, the court relies upon the Isham, Jones, and Superior Oil Co.\textsuperscript{48} cases. This statement is, however, quite different from the doctrine of the Isham case which approved devices if "carried out by means of legal forms", whereas the Gregory case says "by means which the law permits". Hence, it is safe to say that the doctrine of the Isham case becomes a doctrine of substance, rather than a doctrine of form, when applied in the income tax realm. This conclusion is supported by the further holding in the Gregory case that the mere form of a transaction, even though within the letter of the statute, will not control where the substance of the transaction is not "the thing which the statute intended." \textsuperscript{49}

\begin{footnotes}
\item [47] Id. at 469.
\item [48] Superior Oil Co. v. Mississippi, 280 U. S. 390 (1930). In that case Mr. Justice Holmes stated, at 395-396, that "The only purpose of the vendor here was to escape taxation. . . . The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it." The learned Justice relied upon his previous statement in Bullin v. Wisconsin, note 21, supra. In this statement in the Superior Oil Co. case the learned Justice confuses evasion with avoidance. The vendor probably sought to legally avoid. Some people do seek to evade but most taxpayers merely seek to avoid.
\item [49] 293 U. S. 465, 469 (1935).
\end{footnotes}
The **Gregory** case, when correctly read and considered, seems to clarify the situation. The **Isham** case will not be applied in the income tax field to uphold a formalistic scheme of tax evasion which would "exalt artifice above reality". However, by a transaction which is substantial and real a taxpayer may avoid, or, if one prefers, minimize his tax liability. It is safe to say that the **Gregory** case has harmonized the doctrine of the **Isham** case with the doctrine of substance. A number of cases, some clearly, some hazily, have reached this result, while in others the courts have seemed to adhere to the **Isham** case in its pristine form.

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50 Commissioner v. Dyer, 74 F. (2d) 685 (C. C. A. 2d, 1935), cert. denied, 296 U. S. 586 (1935) (Reversing the Board and disallowing losses on sales to a controlled corporation where no cash passed and the stock was purchased more than thirty days later. The case was decided on the theory that there was an implied option to repurchase. It might well have been placed on the lack of substance of the transaction); Commissioner v. Troup, 75 F. (2d) 1010 (C. C. A. 7th, 1935), cert. denied, 296 U. S. 586 (1935) (The facts were the same as in the **Dyer** case and the per curiam reversal was on authority of that case); Commissioner v. Riggs, 78 F. (2d) 1004 (C. C. A. 3d, 1935), cert. denied, 296 U. S. 637 (1935) (This was a companion case of the **Dyer** and **Troup** cases. The decision is based in part on the **Dyer** case and in part on the theory that the taxpayers "did not undergo business losses such as are actually contemplated in the statute, but conceived the losses in paper transactions in order to escape the burden of their tax liability"); Canister Co. v. Commissioner, 78 F (2d) 1013 (C. C. A. 3d, 1935) (Where the company had sold stock to a friend of its president and more than thirty days later repurchased the stock. No cash passed); Schoenberg v. Commissioner, 77 F. (2d) 446 (1935), cert. denied, 296 U. S. 486 (1935) (Where the taxpayer sold stock through a broker to his corporation and more than thirty days later repurchased directly from his corporation); Rand v. Helvering, 77 F. (2d) 450 (C. C. A. 8th, 1935); Atkins v. Commissioner, 76 F. (2d) 387 (C. C. A. 5th, 1935); Asiatic Petroleum Co. v. Commissioner, 79 F. (2d) 234 (C. C. A. 2d, 1935), cert. denied, 296 U. S. 664 (1935) (Involving the reallocation of income among allied trades or businesses under Section 45 of the Revenue Act of 1928). See note 18, supra.

51 Chisholm v. Commissioner, 79 F. (2d) 14 (C. C. A. 2d, 1935), cert. denied, 296 U. S. 641 (1935) (While the court recognizes that substance controls over form, the formula there set forth for determining the substance of a transaction has the practical effect of giving form precedent over substance); St. Louis Union Trust Co. v. United States, 82 F. (2d) 61 (C. C. A. 8th, 1936) (The trustees of a trust created by the taxpayer purchased stock from him at a price which he fixed, and he gave the trustee the exact amount of money with which to pay himself for the stock. The court reversed the court below because two of the findings were unsupported by any evidence); Fulton Oil Co. v. Commissioner, 81 F. (2d) 330 (C. C. A. 9th, 1936) (The Board had held that the proof offered by the taxpayer was not sufficient to show a real sale. The court reversed and remanded with instructions to make a finding as to whether or not there was a sale saying, at 331: "If there was a sale, that ipso facto entitled the taxpayer to the loss thus sustained." This seems to be adopting a test of form rather than substance).
IV
IS THE TAX PURPOSE RELEVANT

In probably the majority of cases when a scheme or method is resorted to for the purpose of decreasing a taxpayer's tax liability, it would not have been resorted to in the absence of such liability, present or contemplated. If the Government attacks the method as being one of evasion, can the court take into consideration the tax purpose of the transaction?

In such litigation the taxpayer will, most likely, solemnly invoke the doctrine of the *Isham* case and the Government will insist upon the doctrine of substance. The court will, or at least it should, reaffirm the taxpayer's right to avoid (i. e., to stay on the right side of the line and reduce his tax), but will also examine the substance of the transaction to see whether it is real and within the law or fictitious and without the pale. The Government will insist that the purpose of the transaction is to evade the tax. Thus, the problem is presented.

It is difficult to understand how any court can examine the substance of a transaction without encompassing in that examination the purpose anticipated and realized. The courts have frequently declared that they will examine the entire plan of action. It is impossible to divorce plan from purpose, because the one is the course of action to be pursued and the other is the necessary and probable consequence of that action. Logically they are more closely related than Damon and Pythias, because they are everlastingly inseparable. Aside from logic, it would be impossible for a judge to shut off from view something that so clearly appears in the vast majority of evasion and avoidance cases. The only legitimate question present is what probative value must, or should, the court give to such a purpose against the taxpayer.

Both plan and purpose must be spelled out of the transaction—out of what actually happened. It cannot be contended that a tax purpose, if it appears in conjunction with other purposes, must necessarily result in a decision against the taxpayer. If any valid ground, possessing substance and constituting an integral part of the plan, exists, the taxpayer has supported his transaction and is entitled to prevail. If he can demonstrate a business purpose suberved by, and a legitimate part of, the transaction he is entitled to a decision in his favor. If, on the other hand, he is unable to demonstrate such a purpose, the evidence will show

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but one purpose for the transaction, i. e., the tax purpose. This purpose alone is not sufficient to support the plan. If, from beginning to end, the one and only result produced by the course of action was to reduce the tax, the transaction must fall as a sham. Hence, it would seem that the courts must consider the tax purpose.\footnote{See Commissioner \textit{v.} Riggs, 78 F. (2d) 1004 (C. C. A. 3d, 1935); Atkins \textit{v.} Commissioner, 76 F. (2d) 387 (C. C. A. 5th, 1935) (where the court said "The whole thing from beginning to end was a device to avoid the payment of income taxes"). This was the effect of the holding in \textit{Gregory v. Helvering}, and was apparently so considered in Humphreys \textit{v.} Commissioner, cited \textit{supra} note 17. It is not open to denial that the Court did consider the tax purpose in Mitchell \textit{v.} Commissioners, 91 U. S. 206 (1875), and Shotwell \textit{v.} Moore, 129 U. S. 590 (1888). See also, Woolfrod Realty Co. \textit{v.} Rose, 286 U. S. 319 (1932).}

In many cases the ultimate objectives are wholly legitimate, but a plan which merely contemplates the achievement of those purposes will either not minimize taxes or will result in an additional tax burden. In these cases there is frequently inserted into the plan a non-germane intermediate step wholly without significance aside from the tax purpose. Certainly the courts should consider the tax purpose in this situation and consider the intermediate step as an attempt to evade.\footnote{The statement in Chisholm \textit{v.} Commissioner, 79 F. (2d) 14 (C. C. A. 2d, 1935), is \textit{contra}. It is believed that that statement is erroneous. Certainly it was unnecessary for the court to make that statement in view of its interpretation of the facts. In this latter connection, the court was careful to say, at 15: "In the case at bar the purpose was certainly to form an enduring firm which should continue to hold the joint principal and to invest and reinvest it. The only possible objection to it is that raised by the Board, that the business so conducted was really not a business at all; that it was in effect the former separate businesses of the brothers conducted under a disguise, and so intended. It seems to us that this is contrary to the only evidence, ..."}

It is desirable to comment briefly on the difference between motive and purpose. The tax motive is usually the only motive existing in the taxpayer's mind at the time the plan is worked out; but here we are entering the field of the objective operations of the taxpayer's mind. The courts should not concern themselves with an inquiry into the question of motive, and any proffer of evidence with regard thereto should be rejected. The inquiry is: What really happened here? That is an objective matter and is to be determined from evidence relating to external, objective facts. The purposes of a plan of action are the things that that plan was reasonably calculated to produce.

\footnote{For cases in which the results support the text, see note 18, \textit{supra}. Chisholm \textit{v.} Commissioner, 79 F. (2d) 14 (C. C. A. 2d, 1935), cited \textit{supra} note 51, \textit{contra}.}
V

CONCLUSION

It may be considered by some to be unfortunate that certainty cannot be imported into this field by defining the terms "evasion" and "avoidance". However, in the very nature of the problem this is impossible. It is perhaps both impossible and undesirable to go beyond the suggestions of Mr. Justice Holmes in *Bullin v. Wisconsin* 66 and the *Superior Oil Co.* 57 case, which amount to this: Avoidance is that which is lawful; evasion is that which is unlawful. The terms merely describe the opposite sides of the line which the law has drawn.

As has been suggested elsewhere, 58 two questions must be asked and answered in each case: What, in substance and in reality, happened here? Was what transpired within the law? In solving each individual problem there are two guides: (1) A taxpayer is entitled to decrease or altogether avoid his tax liability if he do so by means which the law permits. (2) The transaction by which the taxpayer seeks to escape his tax liability must be real, it must be the substance and not the shadow, and mere formalistic devices are not sufficient. The courts quite generally accept these two guides, but the decisions are at variance in the methods of their application. The tax purpose should be considered and where no business purpose is subserved by the transaction, or by the step in the transaction upon which the taxpayer relies, it should be treated as one of evasion.

56 240 U. S. 625 (1916).
57 280 U. S. 390 (1930).
SIGNIFICANT CHANGES IN PUBLIC UTILITY LAW

HUGH EVANDER WILLIS *

THE TERM public utilities will be used here in the generic sense. The term is sometimes used in a specific sense to include such businesses as gas, electricity, telephone, telegraph, etc. This was at first the sole way in which the term was used. More recently the term has been extended to include all businesses affected with a public interest, or those which are otherwise designated as public callings. In this sense, the term will include innkeepers, railways, and other common carriers of goods and of passengers, public warehousemen, and the enterprises formerly designated as public utilities.

However, this discussion will be confined to changes which have affected the law of public utilities as a whole. It will not include changes in the law of specific public utilities. Great changes for example have been incorporated in the law as to the liability of innkeepers and of common carriers with reference to the safety of goods and to the termination of their common law liability. Such changes as these will not come within the range of our discussion which will be confined to more general tendencies.

The law of public utilities is not the only form of social control which has been applied to the businesses which are classified as public utilities. Besides the regulation of these businesses according to the law of public utilities, these businesses have also been regulated (1) by laissez-faire, or self-regulation instead of social control, (2) by the law of enforced competition, (3) by social control like the public utility trust of Great Britain, and (4) by government ownership and operation, or government ownership with private operation under contract, as a substitute for private ownership. Laissez-faire was the rule in the United States for the most part prior to 1875. Enforced competition was cham-

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pioneered by President Woodrow Wilson and is the theory embodied in the Clayton Act, Federal Trade Commission Act, and the Sherman Anti-trust Act and other anti-trust acts, in so far as they were made applicable to public utilities. The public utility trust of Great Britain has never been tried in the United States. Government ownership of utilities has never had much trial in the United States until fairly recent times and even now it has not been tried extensively on any large scale. The T. V. A. experiment is probably the most significant form of government ownership that we have had in the United States. However, in colonial days there probably was not the antagonism to public ownership which manifested itself in the 19th century.

The law of public utilities is of very early origin after the Norman Conquest, but it has attained its greatest importance only in relatively recent times. During all of its history, it has been undergoing significant changes. In the strict period 1272-1613, the public utilities were common callings. These included all trades and businesses, although at that time these were not numerous. All of the trades were liable for negligent acts in trade, and bailees were liable as insurers for the safety of goods

1 Wilson, New Freedom (1913).
2 The essential characteristics of this form of social control are as follows:
   1. Monopoly (in each industry).
   2. Elimination of the profit motive.
   3. The elimination of voting stockholders and the replacement of directors by government appointed trustees.
   4. The payment of fixed interest from 3% to 5%, and the making of stock not tax exempt.
   5. The use of surplus and earnings to reduce charges or to reduce taxes by turning them into the treasury of government.
   6. The establishment of business principles.
   7. The appointment of the trustees by the government on the basis of public spirit and general ability rather than interest representation or party selection.
   8. The placing of the business management in a general manager appointed by the trustees with all salaries fixed by law.
   9. Making responsible for the scheme ex officio, the minister in charge of that government department most closely related to the industry.
  10. The requirement of treasury approval before the floatation of additional securities.

Revised from: Dimock, British and American Utilities (1933) 1 U. of Chi. L. Rev. 265.
3 Adler, Business Jurisprudence (1914) 28 Harv. L. Rev. 135, 152, 158.
4 Arterburn, Origin and First Test of Public Callings (1926) 75 U. of Pa. L. Rev. 411, 419.
in their possession. The only regular public utility duty which rested upon the common callings in the strict period was the duty to serve. In the period of equity, 1613-1793, the public utilities did not include all businesses but only monopoly businesses. At least this was true so far as Lord Hale had influence on this part of the law. To the duty to serve there was added in this period at least one other duty, the duty to serve for reasonable compensation. In this period, the liability for the safety of goods was also somewhat modified. In the period of maturity, 1793-1875, two new public utility duties were added: the duty to serve with reasonably adequate facilities, and the duty to serve without discrimination. Prior to this time, there was no liability except under the law of negligence. But the most significant development of the law of public utilities in the period of maturity was the substitution of contract law for the law of public utilities. In accordance with the goal of law in the period of maturity, the parties were allowed to regulate their conduct for the most part by private contracts.

With the period of socialization, 1875 to date, there came a revival of the law of public utilities. The courts, especially the United States Supreme Court, began to put limitations upon freedom of contract. As a result of the Granger movement, there was a revulsion against the supplanting of the law of public callings by contract, and governmental regulation under the law of public callings again came into vogue. In the celebrated case of Munn v. Illinois, the United States Supreme Court gave a twist to the

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5 Southcote's Case, 4 Co. Rep. 836 (1601); Morse v. Slue, 1 Vent. 190, 2 Lev. 69 (1671).
6 WILLIS, CONSTITUTIONAL LAW (1936) 760.
7 Hale, De Jure Maris, 1 Hargrave Tracts 6; Hale, De Portibus Maris, 1 Hargrave Tracts 78.
8 Allnut v. Inglis, 12 East 527 (K. B. 1810).
9 Bremmer v. Williams, 1 C. & P. 414 (N. P. 1824); Shepard v. Milwaukee Gas Light Company, 6 Wis. 539 (1858).
10 Scofield v. Railway Co., 43 Ohio St. 571 (1885).
12 Railroad Co. v. Lockwood, 17 Wall. 357 (U. S. 1873); Express Co. v. Caldwell, 21 Wall. 264 (U. S. 1874).
13 Munn v. Illinois, 94 U. S. 113 (1876).
14 The reestablishment of the law of public utilities involved a question of due process. As to this point the Court based its decision on the fact that this social control had been a part of English common law and that our Constitution had been adopted in the light of this practice. It might have held it due process of law because of the need for the protection of the social interest both in the general economic progress and in the individual life.

The Court held that it was not a violation of the equality clause to make this social control apply simply to businesses classed as public utilities
law of public utilities as it had been announced by Lord Hale with reference to wharves, so as to make it apply to every business which might be classed as a public utility. This was a use of Lord Hale's law which must have made him twist in his grave.\textsuperscript{15} Since this time, though public utilities and their patrons have been permitted to make contracts to govern their relations, social control has very largely controlled the terms of those contracts and has limited them by the law of public utilities as it has now developed. In this period of socialization one new duty, that of continuity, has apparently developed.\textsuperscript{16}

This paper will be concerned for the most part with those significant changes in public utility law in the United States which have occurred since 1875, or during the period of socialization.

**Test for Public Utilities**

One significant change in public utility law which has occurred since the decision of *Munn v. Illinois* has been the change in the test for public utilities. The test adopted in this case was the test of virtual monopoly, suggested by Lord Hale. The test as to what businesses shall be and what shall not be classed as public utilities is important because, if a business is classed as a public utility, there is a large body of public utility law which applies to it; if it is not a public utility, this body of law will not apply to it, or at least it has not been applied to it until very recently. When the Supreme Court, therefore, adopted the test of virtual monopoly as the test for public utilities, it thereby subjected all of the businesses which are virtual monopolies to the social control known as public utility law. The United States Supreme Court decisions have been the most important in determining the test for public utilities in the United States. State decisions have not always agreed on the test of public utilities, but in the long run, they have tended to follow the test adopted by the Supreme Court. The Court seemed to put a limitation on the test of virtual monopoly in the case of *Budd v. New York*.\textsuperscript{17} But, with this

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\textsuperscript{15} McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759.


\textsuperscript{17} 143 U. S. 517 (1892).
exception, the test of virtual monopoly continued to be the test until the decision of Brass v. North Dakota.\textsuperscript{18}

The Supreme Court in the last case seemed almost to abandon the test of virtual monopoly and to permit a legislative declaration to make any business a public utility. In German Alliance Insurance Co. v. Lewis\textsuperscript{19} the Supreme Court adopted a test which was two-fold in nature, virtual monopoly and indispensable service, a test which had been suggested in the case of Budd v. New York; but the Court did not directly overrule the case of Brass v. North Dakota. However in Wolff Packing Co. v. Court of Industrial Relations\textsuperscript{20} the Supreme Court directly overruled Brass v. North Dakota, held that a business could not be made a public utility by legislative declaration, and adopted a three fold test for public utilities: (1) a grant of privilege, (2) historical survival, and (3) virtual monopoly and indispensable service. The third part of the test is the one which had been emerging in the prior cases and is the only one of importance so far as new businesses are concerned and perhaps it is sufficient to take care of the classes for which the court suggested the first two parts of the test. This test has been consistently applied in cases decided since the Wolff Packing Company Case.\textsuperscript{21}

In spite of the fact that since the decision of Munn v. Illinois the test of a public utility has been made narrower, the number of public utilities has been made larger; and, therefore, the scope of the law of public utilities has been made broader. This, perhaps, has been due to the fact that businesses have changed, so that there are more virtual monopolies now than formerly; and economic and social conditions have changed, so that there are more indispensable services now than there were at one time. All along through the years, more and more businesses have been

\textsuperscript{18} 153 U. S. 391 (1894).


\textsuperscript{20} 262 U. S. 522, 538 (1923). The language of the Court was, "... the indispensable nature of the service and the exorbitant charge and arbitrary control to which the public might be subjected without regulation [because of 'monopoly']."

put into the class of public utilities and there are now new businesses which would undoubtedly be so classified under the test as it now stands if the question was presented to the United States Supreme Court. Among such businesses might be named aviation, radio and holding companies of public utilities.22

PUBLIC UTILITY DUTIES

Another significant change in public utility law during the period of socialization has been the growth of public utility duties and changes in old public utility duties. Most of the growth in this part of public utility law occurred before the period of socialization and we have already referred to that. We have also called attention to the fact that the duty of continuity is a new duty which has arisen in the period of socialization.23 Changes in the duty to serve all, the duty to serve with reasonably adequate facilities, the duty to serve without discrimination and the duty to serve for reasonable compensation have occurred as the Court has applied this law to new and ever changing conditions.

For example the duty to furnish reasonably adequate facilities now requires railways to equip their cars with vestibule doors although at one time this could not have been required.24 In the same way, railways may now be required to equip their trains with power brakes,25 to build union stations,26 and to furnish seats


23 This is not an absolute duty, but public utilities (at least most of them) cannot discontinue their systems without first obtaining either commission consent or a judicial determination of fact that an entire system can operate only at a loss. Brooks-Scanlon Co. v. Railroad Comm., 251 U. S. 396 (1920); Bullock v. Florida, 254 U. S. 513 (1921); Ft. Smith Light and Traction Co. v. Bourland, 267 U. S. 330 (1925).

24 10 C. J. 961.


to passengers. Telephone companies also may be required to furnish physical connections. The duty to serve without discrimination has been limited in application until now segregation of the races is permitted either in inns or on railways. Even the oldest duty to serve all has been explained and qualified so as to exclude from it persons fleeing from justice, afflicted with contagious diseases, planning to gamble on trains or otherwise to endanger the comfort and safety of passengers.

The changes in the duty to serve for reasonable compensation have recently been so great that they are entitled to a little more detailed consideration. In order to determine when a public utility is receiving reasonable compensation some basis for such determination must be adopted. Any basis would involve both a rate base (valuation) and a rate of return. The decisions of the United States Supreme Court on these subjects have neither been consistent nor clarifying, but they have worked significant changes in the application of the law of public utilities.

**Base Rate**

The rate base for the determination of reasonable compensation for public utilities might be determined in any one of a number of different ways which have been suggested. One such way would be original capitalization. This way has been definitely rejected because of the watering of stock in the past. Another way would be by the value assessed for taxation. But the purpose here is so different that this method has not received much consideration. The first method adopted by the Supreme Court for determining the rate base was that of fair value. This was the rate base adopted in the case of *Smyth v. Ames*.

In this rate base, consideration is given to a congeries of diverse and mutually exclusive elements, such as original cost, amount of permanent improvements, value of bonds and stocks, present cost, earning capacity and operating expenses. To attempt to determine a rate base in this way is to attempt the impossible. Justice Brandeis, in his dissent, has conclusively pointed out that "Obviously 'value' 

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29 BEALE, INNKEEPERS AND HOTELS § 55; Chicago & N. W. Ry. v. Williams, 55 Ill. 185 (1870).
31 169 U. S. 466 (1898).
cannot be a composite of all of these elements." Yet in spite of this fact, the Supreme Court has continued to adhere to fair value as its rate base for determining reasonable compensation. In the case of McCardle v. Indianapolis Water Company the Court adopted reproduction cost as the rate base for determining reasonable compensation. The cases following Smyth v. Ames had been giving increasing weight to the importance of reproduction cost and finally in the McCardle Case this was adopted as the sole element to be considered. But in the St. Louis & O'Fallon Railway Case the Court evidently came to the conclusion that it had gone too far in the McCardle Case, and, not knowing what else to do, fell back again on the amorphous fair value rate base of Smyth v. Ames. Yet the Court still continues to give chief emphasis to reproduction cost and in the case of United Railways and Electric Company v. West held that since the rate base requires figuring according to present value, depreciation must be figured in the same way. Reproduction cost as a rate base is likely to be unfair because too large after a period of inflation and too small after a period of deflation; and uncertain because it depends, for the most part, on imaginative guessing by engineers. For this reason another rate base called prudent investment, which is the original cost corrected so as to eliminate any elements which are not just and fair, has been suggested as the best rate base for the determination of reasonable compensation. This was set forth by Justice Brandeis in a dissenting opinion in Missouri v. Public Service Commission and has been followed by some state courts. But the Supreme Court has not as yet adopted it though it is taking a more realistic approach towards the subject. The Supreme Court evidently has not as yet decided upon any final rate base, but it cannot forever wallow in the uncertainties of the rate base announced in Smyth v. Ames.

33 Minnesota Rate Cases, 230 U. S. 352 (1913); Southwestern Bell Case, 262 U. S. 276 (1923); Georgia Ry. & Power Co. v. Railroad Comm., 262 U. S. 625 (1923); Bluefield Water Works and Improvement Co. v. Public Service Comm., 262 U. S. 679 (1923).
34 272 U. S. 400 (1926).
37 262 U. S. 276, 289 (1923).
39 Dorety, Functioning of Reproduction Cost in Public Utilities and Rate Making Valuation (1923) 37 HARV. L. REV. 173; Edgerton, Value of the
THE RATE OF RETURN

At first the United States Supreme Court was inclined to allow about six per cent as the rate of return. Later it held that six per cent was too low a rate of return. Finally it allowed a rate of return as high as eight per cent when over two-thirds of the money invested in the business was borrowed money, borrowed at a rate much lower than this. In *Los Angeles Gas and Electric Corp. v. Railroad Commission* a rate of seven per cent was allowed.

The duty to serve for reasonable compensation which rests upon public utilities is supposed to limit the amount of their profits to less rather than to increase their profits to more than other businesses obtain. Yet the rate of return guaranteed to public utilities by the United States Supreme Court has probably given these businesses affected with a public interest a right to more profits than other businesses, on the average, have been able to obtain. The Supreme Court has said that public utilities are entitled to the same sort of return that is obtained where money is invested in other equally secure enterprises. The United States government has been able to sell its tax exempt securities for from two to four per cent interest. Insurance companies and savings banks have allowed a lower rate of interest than this on money invested with them. Large corporations, both public utilities and those not public utilities, have been able to sell their bonds not tax exempt for an interest rate of four per cent to


42 United Railways and Electric Co. of Baltimore *v.* West, 280 U. S. 234 (1930).

43 289 U. S. 287 (1933).
five per cent and their preferred stock for six per cent. Public utilities are some of the biggest and safest businesses in the United States and they would have been even safer if they had not been allowed as high a rate as has been guaranteed them. The Court has evidently allowed increasingly too high a rate of return.

The result on the one hand of such a high rate of return as the Supreme Court has allowed has been to prevent the economic development both of the public utilities and of the country as a whole. High freight and passenger rates for the railroads, instead of making them prosperous, were tending to injure them, because with such high rates they could not meet other competition. It was only when the Interstate Commerce Commission forced lower rates upon the railroads that they began to make more money. High rates in the same way hindered development of electric companies. The companies which made the greatest profits during the year 1936 were those which had been forced to cut their rates by the T. V. A. The worst effect of these high rates has, however, been the retarding of the economic development of the country as a whole. The high electric rates were robbing our country of cheap electricity. No one can estimate the loss to our country as a whole in not having cheap electricity.

The result on the other hand of this high rate of return has been the encouragement of an orgy of high finance which has been bad both for the public utilities and for the public as a whole. The Supreme Court has allowed a rate of return higher than the dividends which public utilities have had to pay on preferred stock and the interest which they have had to pay on bonds. In order to absorb this difference and to cover up this fact, public utility magnates have organized holding companies to own the common stock of the operating companies and they have financed the holding companies in the same way that the operating companies had been financed by selling bonds and preferred stock for less than the rate of return guaranteed public utilities by the Supreme Court. Then one holding company has been pyramided upon another. In this way a few insiders have been obtaining returns running all the way from twenty per cent to one thousand per cent.44 This was bad enough, but they were not content merely to exploit the situation created by the United States Supreme Court. They were so anxious to indulge in high finance that they indulged in such sorts of scandals, corruptions and wild-cat

speculations that very frequently they not only lost the exorbitant profits they might otherwise have obtained but they brought their businesses down in ruins upon their heads.

So far as concerns the duty of public utilities to serve for reasonable compensation, therefore, the law of public utilities, or governmental regulation has not been a success. So far as concerns the other public utility duties, probably the law of public utilities has on the whole been fairly successful. But the failure of public utility law in the matter of reasonable compensation has been so great that it is a question of whether all the law of public utilities should not be abandoned and some other scheme of social control tried in its stead. The reason for this failure has been three fold. First, it has been due to the attitude of public utilities who have fought governmental regulation and have tried to make it ineffective. Second, it has been due to the administration of the law by state public service commissions who have sometimes been subject to corruption by public utilities, and frequently filled by men who lack qualifications for their task. Third, it has been due to the unfortunate decisions of the United States Supreme Court on the rate base and the rate of return for the determination of reasonable compensation. These decisions have probably been responsible more than any other cause for the failure of governmental regulation of public utilities.

More recently a slight attempt on the part of the federal government has been made to correct the evils of public utility holding companies. The United States Supreme Court has taken the position that in determining the reasonableness of the income allowed to an operating company, the amount paid by an operating company to a holding company may be investigated.45 Congress also has passed a public utility holding company act which puts important limitations upon such interstate holding companies.46 While it does not abolish holding companies in the public utility field, it requires registration for interstate commerce and for use of the United States mails, makes it unlawful even for registered companies to issue or sell securities from house-to-house without a declaration filed and forbids the acquisition of other securities without consent of the Securities and Exchange Commission, simplifies the holding company systems so as to eliminate pyramiding, forbids service, sales and construction con-

tracts for operating companies and makes profits acquired by officers inure to holding companies. This act raises some important constitutional questions. One is a question of violation of our dual form of government, but probably the act can be upheld here under the commerce power and the postal power. Another is a question of delegation of legislative power, but probably sufficient standards for the Security and Exchange Commission have been set up to meet this point. A third constitutional question involves due process, but it would seem that there is a sufficient social interest to be protected to make the act constitutional so far as concerns this point, either under the police power or under the regulation of public utilities. If the act is constitutional, it will contribute in no small measure to the elimination of some of the evils which have grown up in this particular field of governmental regulation.

However, the regulation of holding companies will not solve the main problem of governmental regulation of public utilities. That problem can only be solved by a change in the law as to the rate base and as to the rate of return. A change in the law as to the rate of return is perhaps the most important thing. It would seem to the writer that an experimental rate of return of four per cent would come as near to being the correct rate as any that might be suggested. This rate is as high as the rates of return which can be found in other comparable investments, and under the public utility trust of Great Britain. It is believed that if a rate no higher than this was allowed, there would be no difficulty in public utilities obtaining all the money which they need for their enterprises. When they are able to sell their bonds for from four per cent to five per cent interest it seems very singular that the companies should be guaranteed a higher rate of return than they have to pay when they borrow money. If this rate of return was all that was allowed, it would automatically eliminate holding companies and most of the other evils of high finance which have crept into the public utility business, but the reform waits upon the Supreme Court. Until the Supreme Court reverses its decisions on this point, it would seem no effective solution of many public utility problems is possible.

**Public Counsellor**

A development in public utility law of some significance is the creation of the office of public counsellor. Many states have now created this office. The reason for the creation of public counsellors has been the failure on the part of public service commissions...
to aid the legislatures in the development of policies and to apply administrative control to public utilities, and their attempt to act more or less as courts in deciding conflicting claims according to law. In the beginning it was assumed that the courts were adequate to protect the public utilities and that public service commissions had, as their function, the protection of the public. Yet more and more they have tended to become quasi-judicial bodies. This has been due partly to the personnel of the commissions (generally lawyers familiar with regular legal procedure) and to the attitude of the courts in commission cases.\(^47\) The office of public counsellor has been established to represent the public in litigation before public service commissions.\(^48\)

**EXTENSION OF PUBLIC UTILITY LAW TO OTHER BUSINESSES**

A most significant recent development of public utility law has been the extension of this law so far as it concerns the regulation of prices to other businesses than public utilities. In the case of *Stephenson v. Binford*,\(^49\) the Supreme Court upheld the regulation of the charges of contract carriers. This seemed to be an extension of public utility law to other businesses rather than an enlargement of the number of public utility businesses but if there was any doubt on the subject, this was removed by two other cases. In *O'Gorman & Young v. Hartford Fire Ins. Co.*,\(^50\) the Supreme Court permitted the regulation of the charges of insurance brokers. This, of course, was a price regulation of a public utility business but in the prior case of *Wolff Packing Co. v. Court of Industrial Relations of Kansas*,\(^51\) the Supreme Court had held that it would not allow the fixing of wages of employees even if they were working for public utilities. In the case of *Nebbia v. New York*,\(^52\) the Supreme Court definitely applied a public utility duty to a business which was not a public utility. In the *Nebbia Case* the Supreme Court held that the prices in a milk business could be regulated even though the business did not have a virtual monopoly so that it could be declared a public utility. In the prior case of *Williams v. Standard Oil Co.*,\(^53\) the Supreme Court had held that price fixing was illegal outside of

\(^{47}\) *In re Northwestern Indiana Tel. Co.*, 201 Ind. 667, 171 N. E. 65 (1930).

\(^{48}\) Cunningham, *Why a People's Counsel?* (May 29, 1930) 5 P. U. Fort. 676.

\(^{49}\) 287 U. S. 251 (1932).

\(^{50}\) 282 U. S. 251 (1931).

\(^{51}\) 262 U. S. 522 (1923).

\(^{52}\) 291 U. S. 502 (1934).

\(^{53}\) 278 U. S. 235 (1929).
public utilities. This shows the significance of the change in the law of governmental regulation. The *Nebbia Case*, if taken at its face value, not only broke the United States taboo against price fixing, but opened the door to the extension of the social control, known as the law of public utilities, to all businesses and not simply to those which have a virtual monopoly and are rendering an indispensable service. Of course, as yet the Supreme Court has only extended the duty to serve for reasonable compensation to these other businesses, but it would not be surprising if, in the course of time, it extended all other of the duties. Civil rights statutes, as a matter of fact, have already required to serve without discrimination, businesses which are not public utilities such as barbers, restaurants, theaters, and dance halls. And these statutes have been upheld as proper exercises of the police power. The Supreme Court now seems inclined to take the position that the term "affected with a public interest means no more than that an industry, for adequate reason, is subject to control for the public good."

Stimulated by this development in the law, Congress has passed the Robinson-Patman Act forbidding price discrimination between competing purchasers of goods of like grade and quality, if the goods are articles of interstate commerce, for use in the United States, and the discrimination tends to lessen competition and so create a monopoly. The wisdom of this legislation may be a matter of doubt but there is no doubt that Congress is undertaking to take advantage of the *Nebbia Case* to regulate prices outside of public utilities. It is founded on the *Nebbia Case*. It is an attempt to apply generally public utility law as to discrimination.

The administration of the Robinson-Patman Act has been committed to the Federal Trade Commission. The act does not forbid discrimination where there is a difference in cost of manufacture, sale or delivery. Prices may also change with the market. It does not forbid people to choose their own customers. But proof of discrimination creates a prima facie case and the Federal Trade Commission is authorized to issue a cease and desist order

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unless the accused shows justification. Brokerage commissions are not permitted as discounts. Advertising allowances are prohibited unless competitors use them. Discrimination between purchasers for resale is prohibited. It is made unlawful knowingly to induce or receive a discrimination in price. It relies upon the previous enforcement provisions of the Clayton Act but adds new criminal provisions and protects cooperative associations.

This act raises some difficult constitutional questions. Perhaps the Nebbia Case covers the extension of the law as to discrimination to fields outside of public utilities, though it probably is not safe to generalize much from the Nebbia Case; 59 but there are other constitutional questions. Probably the act as a whole could be upheld as constitutional if the Supreme Court will take the position that the prohibitions are not absolute. For the Federal Government to have the power indicated, it must be found in the commerce clause. The act is not expressly so limited but the Court could undoubtedly confine it to interstate commerce. So far as concerns due process, the Court could probably find a sufficient social interest for this regulation as much as it can for the regulation of public utilities, except for the prima facie rule. The Supreme Court has held that it is a denial of due process of law to make conclusive presumptions as to substantive consequences.60 To uphold the act, it will have to hold that there is both a rational connection between the fact proved and the ultimate fact presumed, and that the inference of the latter fact is reasonable. The act seems to be aimed at chain stores. Whether or not it is a violation of the equality clause for this reason will depend upon whether or not the Supreme Court thinks the protection of independent wholesalers and retailers is sufficient reason for the classification.

**JUDICIAL REVIEW**

A still further significant change in public utility law concerns judicial view. In the case of Munn v. Illinois 61 the Supreme Court took the position that rate regulation was a legislative matter not subject to judicial view. But after the eighties, when due process was extended to matters of substance, the Court took the position that a due process question is involved in rate making and that if rates are too low, i.e., confiscatory, public utilities are deprived of their property without due process of

60 Manley v. Georgia, 279 U. S. 1. (1929).
61 94 U. S. 113 (1876).
law. Of course, this made the question a judicial question and made the judicial power extend thereto. This jurisdiction might have been limited to questions of law. The Supreme Court, however, in administrative cases extended judicial review not only to matters of fact but to a trial de novo; and held that if a court acts as an administrative agency, a judicial review by another court is necessary to satisfy the requirements of the law. Recently the Court has begun to show more respect for commission findings of fact. But it is doubtful if a satisfactory result can ever be obtained without abolishing judicial review in the case of due process as to matters of substance. Since there is no hope of this change coming to pass even by a change in the personnel of the Court, there seems necessary an amendment to the Constitution providing that the judicial power of the Courts of the United States shall not extend to due process as a matter of substance. Even then the judicial power would continue to extend to due process as a matter of procedure and would limit the methods of commissions.

**Government Ownership**

Government ownership is still another significant change or development in the field of public utilities. It is not a change in public utility law. It is a change in the solution of the problem of rendering indispensable social services where there is a situation of virtual monopoly. When government ownership comes in, private ownership and operation under the law of public utilities is likely to go out. There has been considerable development in the United States as well as in foreign countries in government ownership and operation of many social services. The T. V. A. experiment is one of the latest and perhaps one of the most successful of these experiments in the United States. Whether this is to develop into a scheme of government ownership and operation of important electrical services or whether it is to remain merely a yardstick for determining what is reasonable compensation for public utilities remains as yet an open

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63 WILLIS, CONSTITUTIONAL LAW (1936) 668-672.
question. It, of course, is an attempt, so far as it is a yardstick, to accomplish indirectly what cannot be accomplished directly because of the barrier of United States Supreme Court decisions.

It now seems as though some other changes in public utility law must be made which will perhaps be more significant than any that have occurred in the last fifty or sixty years. Governmental regulation under the law of public utilities has not been a success for the reasons which we have already set forth. Something must be done about this. It is impossible to go back to a reign of laissez-faire. It is impossible to enforce competition. It probably would be impossible to introduce into the United States the public utility trust of Great Britain despite its many fine features. Government ownership and operation would probably solve the problem and accomplish the results desired; but in the United States, there is a great deal of prejudice against a general scheme of government ownership, in spite of the fact that we already have government ownership of about one-tenth of the business enterprises of the country. There remains, therefore, only private ownership and operation of public utilities under governmental regulation. Since the latter is not working satisfactorily, it cannot be continued longer without reformation. If the right reforms were instituted, this might become both an effective and fair scheme of social control. Apparently the only constitutional way to affect these reforms is by a reversal of its decisions on the rate of return and rate base by the United States Supreme Court. The Supreme Court recently has shown that it is coming closer to economic realities, but it has not as yet given much ground for optimism on this point. However, if the reforms suggested were brought to pass, it would make the law of public utilities both a good scheme of social control for the field of public utilities and a good scheme of social control to incorporate into the general body of police power law, if it should seem wise to extend the scope of public utility law to all businesses.

LIFE INSURANCE SOLICITOR—EMPLOYEE OR INDEPENDENT CONTRACTOR*

ALFRED J. BUSCHECK †

ONE OF THE DIFFICULT PROBLEMS presented in the administration of the Social Security Act \(^1\) is the determination of who are employees and who are independent contractors. With certain enumerated exceptions, two titles of the act \(^2\) include all qualified employees. Before it is possible to decide that a given individual comes within the purview of the act, it is necessary to determine that he is an employee and not an independent contractor. This is true of life insurance solicitors. It is the purpose of this article to furnish the answer to the question of whether such solicitors are employees or independent contractors.

No attempt will be made to deal with the entire subject of the status of all persons engaged in the acquisition of business for insurance companies of all kinds. Such a study would unduly extend this paper. Only in so far as general principles enunciated herein are applicable to other situations is the general subject treated. Neither will the more difficult task be undertaken of reconciling the vast number of inconsistent and contradictory statements of the courts with reference to the status of salesmen generally. A veritable judicial Solomon could not formulate any general principle or principles which would reconcile all such statements because so often based on a vague and nebulous conception of what constitutes a servant, an agent, and an independent contractor.

This study deals only with life insurance solicitors. It does not deal with general or state agents or state managers of life

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* The views and conclusions expressed herein are the individual views of the writer only and must not be regarded as an authoritative statement of the views of any government department, board or bureau or of any other organization or individual.

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insurance companies. It does not deal with persons concerned in procuring for their companies other forms of insurance than life insurance. It does not deal with life insurance solicitors who devote only part of their time to soliciting life insurance, nor to solicitors who solicit life insurance for several companies. It leaves out of account the persons engaged in soliciting various kinds of insurance, including life insurance, for various companies. This inquiry merely concerns itself with the application of the principles of law relating to independent contractor and employee to that limited class of persons who devote all of their working time and effort to soliciting applications for a single life insurance company, deliver the policies issued pursuant to such applications, and collect the first premiums for such policies. It, however, includes all persons within that limited class irrespective of whether the remuneration consists of a salary, commissions, or a salary and commissions.

Two classes of life insurance solicitors come within the field of this inquiry, first those who solicit ordinary life insurance and, secondly, those who solicit industrial life insurance. A much greater degree of supervision is exercised over the latter than over the former. The latter usually have definite hours for work. They are required usually to work their limited territory intensively. In some instances they are required to solicit each home in their territory. Part of their duties consist of making written periodic collections at short intervals. They are usually paid on a salary and on a commission basis. The solicitor of ordinary life insurance, on the other hand, usually has a more extensive territory and is paid entirely on a commission basis. He is usually given absolute discretion as to the time and place for soliciting and is entirely free to select his prospects. Both classes in soliciting are required to observe, and are bound by, the rules and regulations of the company contained in a book of rules with which they are provided. Such book fixes the terms on which policies are issued. However, for neither class do companies generally provide or furnish means of transportation nor exercise any control whatever over the means of locomotion used. Solicitors of both classes are free to use any means they wish for getting about their territory and are required to provide and pay for the means they use.

The contracts of solicitors frequently expressly negative the existence of an employer-employee relation. They also usually contain provision for terminating the contract either on short notice or on such notice after it has been in effect for one year.
They provide expressly or by implication that the solicitor shall deliver policies issued on applications secured by him on payment to him of the first premium in cash. Frequently such solicitors are authorized to make a binding preliminary contract pending acceptance or rejection of the application. All applications are subject to acceptance or rejection by the company. Sometimes, but not always, there is a provision that the solicitor shall perform such other duties as may be required of him. Frequently the solicitor is authorized to employ subagents. Contracts with subagents are required to be in writing, must usually be signed by a representative of the company, must be on blanks furnished by the company, and one copy must be filed with the company. Licenses required by state law are procured by the company for its solicitors. Application blanks, rate books, sample policies, and other supplies are furnished the solicitor by the company without charge. The solicitor is invariably referred to as an agent.  

It is proposed, first, to consider certain factors or tests on which courts have relied in determining whether a solicitor or salesman is an independent contractor. Next, the factor which distinguishes an agent from an independent contractor will be considered. It will then be shown that certain recent, well-considered cases, involving insurance solicitors of the kind herein dealt with, do not hold that such insurance solicitors are independent contractors. Finally, it will be shown that such insurance solicitors, being agents, are employees.

**FACTORS OF IMPORTANCE IN DETERMINING WHETHER A LIFE INSURANCE SOLICITOR IS AN INDEPENDENT CONTRACTOR**

In determining whether a life insurance solicitor, as herein defined, is an independent contractor certain factors to which the courts have attached importance need to be considered. The first of these is the mode or manner of payment.

While the mode and manner of payment for the work to be done is an element to be considered in determining whether a life insurance solicitor is an independent contractor, it is not controlling.  

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8 The statement as to solicitors' contracts is based on the life insurance cases hereinafter discussed in detail, on an analysis of several solicitors' contracts, and on the knowledge of the writer of the manner in which insurance is solicited; also on the contracts set out in full in Fass v. Atlantic Life Insurance Co., 105 S. C. 107, 89 S. E. 558 (1916).

As industrial solicitors are paid both a salary and a commission, the method of payment is of no significance in determining their status. As to solicitors of ordinary insurance, the fact that they are usually paid only a commission may be of very slight evidentiary value in indicating an independent contractor relation. This, however, is outweighed by other considerations to be hereafter mentioned.

The circumstance that the employer possesses the right of terminating the contract at any time, irrespective of whether there is or is not a good cause for doing so, is indisputably an evidentiary fact which tends strongly to show that the person employed is not an independent contractor. However, it is not conclusive. Able counsel for some insurance companies have sought to avoid this result by providing for termination at will only after a year from the date thereof. This, like so many other provisions of the contract, seems designed for the purpose of enabling the company to argue that the contract creates an employer-employee relation when that best suits its purpose and to argue that it creates an independent contractor relationship when that is to its advantage. Also, the solicitor is usually required to give notice in advance if he intends to resign. This negatives an independent contractor relation. The provisions as to the right of termination, as it is incorporated into life insurance solicitors' contracts, is therefore of no help in deciding what kind of a relation was established.

The fact that these hybrid solicitors' contracts expressly negative the existence of an employer-employee relation is not


In note (1929) 61 A. L. R. 223, the rule is stated as follows:

"The fact that a salesman's services are compensated for on a commission or percentage basis is not a decisive test by which to determine whether he is an independent contractor or a servant, although in determining the relationship the courts have sometimes taken into consideration the manner of payment."


6 Note (1931) 75 A. L. R. 725, 727.

7 Note (1922) 20 A. L. R. 684, 792 and cases cited.

8 Note (1922) 20 A. L. R. 684, 755.
conclusive. In the Kesler Construction Company case the court said:

"The rights of the parties under the contract are not to be determined solely by names they call each other, but rather by the intent and meaning of the terms of the instrument."

Insurance companies always fix the terms of the policy and the premiums. The solicitor has no discretion whatever in determining the terms of the contract to be entered into between the assured and the company or the premium to be paid by the assured. Also, applications must be approved by the company before a policy is issued. Companies may and do reject applications. A situation in which the salesman has no discretion as to terms and price and in which the sanction of the company is required before a policy can be issued is more consistent with an agency relation than with that of independent contractor.

It is undoubtedly true that the solicitor of ordinary insurance usually determines for himself his hours and place of work and whom to solicit. Most solicitors' contracts give them that right. Where such right is not specifically given it can probably be inferred. The possession of this right has been said to be in some situations of slight evidentiary value indicating an independent contractor relation. However, due to the fact that a prospect for ordinary insurance must be found by the solicitor and must be interviewed at such time and place as the prospect may indicate desirable, a solicitor must, of necessity, possess the right to determine whom he will solicit and the time and place of soliciting, irrespective of whether his status is that of an independent contractor, an agent, or a servant. In other words, the selection of prospects and the determination of the time and place of solicitation, because of the nature of the business, is usually, and must of necessity, be left to the solicitor. As a


12 Note (1922) 20 A. L. R. 684, 790 and cases cited.
matter of fact, therefore, the fact that the time and place of solicitation and the selection of prospects is left to the solicitor does not indicate an independent contractor relation.\textsuperscript{13}

The fact that the insurance company furnishes the things essential to the act of soliciting insurance, such as application blanks of various kinds, rate books, sample policies, and similar matter, is of some evidentiary value as indicating that the status of the solicitor is not that of independent contractor, although not conclusive.\textsuperscript{14}

The effect of the fact, as indicating an independent contractor relation, that many solicitors have the right to engage subagents is overcome by the fact that the company fixes the terms of such contracts.\textsuperscript{15} Also, the right to employ subagents is not conclusively indicative of an independent contractor relation.\textsuperscript{16}

The fact that one is to solicit pursuant to rules and regulations of the employer negatives an independent contractor relation.\textsuperscript{17} This is also true if the solicitor is required to perform such duties as are required of him by the company.\textsuperscript{18} This is because it tends to show that the control as to the details of the work is in the employer.

It has frequently been stated that one who exercises an independent employment, calling, occupation, or business is an independent contractor. However, the decisions are conflicting as to whether this is of significance. In any event, it is not conclusive.\textsuperscript{19} Furthermore, it is questionable whether a life insurance agent can be said to be engaged in an independent employment, calling, occupation, or business. While a few cases probably so hold as to fire and casualty insurance agent,\textsuperscript{20} no court decision has ever given such a status to life insurance solicitors.\textsuperscript{21}

\textsuperscript{13} Standard Oil Co. \textit{v.} Parkinson, 152 Fed. 681 (C. C. A. 8th, 1907); Aisenberg \textit{v.} C. F. Adams Co., 95 Conn. 419, 111 Atl. 591 (1920); Pickens \textit{v.} Diecker, 21 Ohio St. 212 (1871); Burgess \textit{v.} Garvin, 219 Mo. App. 162, 272 S. W. 108 (1925); note (1922) 19 A. L. R. 1168.

\textsuperscript{14} Notes (1922) 20 A. L. R. 684, 778, (1931) 75 A. L. R. 725, 727 and cases cited.

\textsuperscript{15} Notes (1922) 20 A. L. R. 684, 774 and 795 and cases cited.

\textsuperscript{16} Williams \textit{v.} National Cash Register Co., 157 Ky. 836, 164 S. W. 112 (1914); \textit{In re} James Murray, 130 Me. 181, 154 Atl. 352 (1931).


\textsuperscript{18} Neece \textit{v.} Lee, 129 Neb. 561, 282 N. W. 1 (1925).


\textsuperscript{20} \textit{In re} Chapman Insurance Agency, 50 F. (2d) 252 (D. C. Ky. 1931).

\textsuperscript{21} Note (1922) 19 A. L. R. 1168, 1295.
It is implicit in the term independent contractor that the one undertaking to do the work contracts to produce certain definite tangible results. He must have some particular task assigned to him which he has a right to complete and is under obligation to complete. He must contract to do a particular piece of work.\textsuperscript{22} Insurance solicitors of the type herein considered do not contract or undertake to produce any such results. Their contracts are fully performed when they devote all their time to endeavoring to sell insurance irrespective of the number of sales, if any, which they make. The results obtained are important merely as a means of determining compensation. They are, therefore, not independent contractors.\textsuperscript{23}

The general character of the employment, it being for an indefinite period, is an element which tends to show that the person employed is not an independent contractor.\textsuperscript{24}

An insurance solicitor, as has been shown, is probably not engaged in any distinct occupation, calling, business, or employment. He does not undertake to do a particular piece of work. He is employed for an indefinite period to perform a certain kind of work on a quantitative basis so far as compensation is concerned. This negatives an independent contractor relation.\textsuperscript{25}

The fact that a life insurance solicitor undertakes to devote all of his time to his work and to work for no one else is indicative of a servant relation rather than that of independent contractor.\textsuperscript{26}

The provision that the solicitor will perform such other duties as may be required of him indicates such control in the employer as to negative the existence of an independent contractor relation.\textsuperscript{27}

Innumerable statements can be found in cases, text books, and annotations to the effect that the ultimate test for determining whether a principal and agent or a contractor and contractee relationship exists is that of the right of control as to the manner,

\textsuperscript{22}Jensen \textit{v.} Barbour, 15 Mont. 582, 39 Pac. 904 (1895); 16 AM. \& ENG. ENCYC. OF LAW (2d ed. 1900) 187; 14 R. C. L. 67; SHERMAN \& REDFIELD, NEGLIGENCE (6th ed. 1913) 396.


\textsuperscript{24}Note (1922) 19 A. L. R. 1168, 1337 and cases cited.

\textsuperscript{25}Note (1922) 19 A. L. R. 1168, 1336 and cases cited.

\textsuperscript{26}Leuis \textit{v.} National Cash Register Co., 84 N. J. L. 598, 87 Atl. 345 (1913); Dillon \textit{v.} Prudential Ins. Co., 75 Cal. App. 226, 242 Pac. 736 (1926); note (1922) 20 A. L. R. 684, 792.

method, means, and details of doing the work. The rule is well summarized in a recent annotation.\(^{28}\) It is there stated that "the ultimate test in determining whether a person employed to do certain work is an independent contractor . . . is the control over the work which is reserved to the employer."\(^{29}\) For the purpose of distinguishing between a servant and an independent contractor this test is valuable. For the purpose of distinguishing between one who is an agent and not at the same time also a servant and an independent contractor it is of little, if any, use.\(^{30}\) Even for the former purpose it loses some of its value because of the difficulty in its application. Courts differ as to what situations fall within the class in which control is reserved to the employer and which do not. Another test entirely conclusive and more readily applicable must be found for the purpose of determining whether or not a life insurance solicitor is an independent contractor. Before doing so, however, it should be noted that life insurance solicitors are subject to considerable control. The only details left to them, namely, the selection of prospects, and the time and place of solicitation, cannot be controlled no matter whether their status is that of servant, agent, or independent contractor. Also, it should be noted, that all tests so far discussed are either inconclusive or negative an independent contractor relationship and that some indicate a master and servant relation.

**THE CONCLUSIVE AND BASIC DISTINCTION BETWEEN AN AGENT AND AN INDEPENDENT CONTRACTOR**

It is not necessary here to distinguish generally and completely between agent, servant, and independent contractor. These relations are not exclusive of each other. A person may have one status as to one act or portion of work at one time and another status as to another act or portion of work at another time.\(^{31}\) The relations of principal and agent and contractor and obstructee are exclusive of each other in that as to the same act or portion of work or at the same time one person cannot have more than one such status.\(^{32}\)

\(^{28}\) Note (1931) 75 A. L. R. 725.

\(^{29}\) See also note (1922) 19 A. L. R. 226, 235 and 1168, 1278.

\(^{30}\) Infra, page 903.

\(^{31}\) Cowles v. Mardis, 192 Iowa 890, 181 N. W. 872 (1921); Kingan & Co. v. Silvers, 13 Ind. App. 80, 37 N. E. 413 (1894); Stagg v. Taylor, 119 Va. 226, 89 S. E. 237 (1916); Rothchild v. Northern P. Ry., 68 Wash. 527, 123 Pac. 1011 (1912); Carolina Hardware Co. v. Raleigh Banking & Trust Co., 169 N. C. 744, 86 S. E. 706 (1915); 14 R. C. L. 76; note (1922) 19 A. L. R. 226, 270 and cases digested.

For the purpose of establishing the status of insurance solicitors it suffices to point out that the ultimate test which clearly distinguishes a servant from an independent contractor is that a servant is subject to the control of the master as to the manner, means, methods, and details of doing his work; an independent contractor is subject to no such control. An independent contractor is responsible to him for whom he has undertaken to do a given piece of work only for the ultimate result.  

For the purpose of establishing the status of insurance solicitor it also suffices to point out that the two features which, combined, clearly distinguish an agent from a servant are, first, that an agent represents his principal in business dealings for the purposes of establishing contractual relations between him and third persons and, secondly, that he is not entirely subject to the control of the principal as to the means and manner of accomplishing results but is entitled to use some discretion.

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In Kingan & Co. v. Silvers the court said:

"There is, . . . in legal contemplation, a difference between an agent and a servant. The Romans, to whom we are indebted for many of the principles of agency, in the early stages of their laws used the term 'mandatum' (to put into one's hand, or confide to the discretion of another) and 'negotium' (to transact business, or to treat concerning purchases) in describing this relation. Story, Ag. Sec. 4. Agency, properly speaking, relates to commercial or business transactions while service has reference to actions upon or concerning things. Service deals with matters of manual or mechanical execution. An agent is the more direct representative of the master, and clothed with higher powers and broader discretion than a servant. Mechem, Ag. Section 1, 2. The terms 'agent' and 'servant' are so frequently used interchangeably in the adjudications that the reader is apt to conclude they mean the same thing. We think, however, that the history of the law bearing on this subject shows that there is a difference between them. Agency, in its legal sense, always imports commercial dealings between two parties by and through the medium of another. An agent negotiates or treats with third parties in commercial matters for another."
Although the term "servant" usually has reference to one rendering manual services for another under such immediate and direct control of the other that he may be said to be carrying out the will of the other, the term "servant" is not necessarily limited to one rendering manual labor but includes "one who performs continuous service for another" and who as to the manner, means, methods, and details in so doing is subject to the will of the master.

A "servant" is a worker for another who deals ordinarily with things, and who has no power to bring about contractual relations with third persons; while "an agent" is one who deals not only with things, but persons, using his own discretion as to means, and establishing or negotiating to establish contractual relations between his principal and third persons.

When the agent's physical activities and his time are surrendered to the control of the master he is also a servant. When he merely agrees to use care and skill to accomplish a result, subject to the fiduciary duties of loyalty and obedience to the wishes of his principal, but is not subject to the control of the principal as to the manner of accomplishing the result, he is an agent but not a servant.

How then are we to distinguish an agent from an independent contractor for the purpose of determining the status of a life insurance solicitor? Obviously, if the basis or ultimate test for distinguishing a servant from an independent contractor is who has the right of control over the mode, manner, method, means, and details of the work to be done, and if the basic or ultimate distinction between an agent not a servant and a servant is also who has the right of control over the mode, manner, method, means and details of the work to be done, then this cannot be the determining test for distinguishing between an agent and an independent contractor. In fact, it is of no value whatever in distinguishing an

36 Restatement, Agency (1933) § 220, comment on subsection (1) (a).
38 Restatement, Agency (1933) § 220, comment on subsection (1) (c).
39 Note (1922) 19 A. L. R. 226, 253 §§ 15, 16, 17, 18 and 19 and cases cited. While the learned writer of the annotation stated his logical conclusions with considerable hesitancy he need not have done so nor made the statement that American courts have not adopted them. While American courts continue to pay lip service to the right of control of detail test they act upon the basis of the distinction made by the author. Moreland v.
agent not also a servant from an independent contractor. The ultimate and basic distinction applicable both to the agent who is also a servant and the agent who is not turns on the question of whether or not the individual whose status is in question represents his principal in establishing contractual relations between him and third persons. If he does so represent his principal, he is an agent and not an independent contractor. 40

This rule, which was the basis of the decision in the Moreland case, 41 is well stated in that case as follows:

"But it would seem that where the agent's functions are concerned, either entirely or mainly with the execution of contracts on behalf of the principal, although not subject to control of the principal with respect to details of the work, he is an agent and not an independent contractor."

Although one who represents his principal in establishing contractual relations is an agent, as distinguished from an independent contractor, if he is an agent who is not also a servant, his principal is not liable for his negligent conduct unless the act was within scope of his employment and was expressly or implicitly authorized by his principal. 42

It should also be noted that it probably does not necessarily follow from what has gone before that one who does not represent his principal in establishing contractual relations is an independent contractor if he is not a servant. That question is not within the scope of this inquiry because, as will be shown shortly, life insurance solicitors represent their principals in establishing contractual relations.

The same conclusion, namely, that the test whether or not one represents his principal in establishing contractual relations determines whether the status of a life insurance solicitor is that of agent, is reached by considering another line of cases.

Courts have frequently been called upon to determine whether one who undertook construction or repair work for an owner was an agent or an independent contractor in order to determine whether or not the owner incurred liability to third persons by


42 Infra, page 911.
reason of the contract of him who undertook the construction and repairs.\textsuperscript{43}

In the \textit{Kesler Construction Company case} \textsuperscript{44} the court stated the problem as follows:

"Manifestly, if the plaintiff was an independent contractor, it was bound to pay for the materials. . . . Upon the other hand, if the plaintiff was agent for the defendant owner . . . then the owner was bound to pay for all materials used in the building."

The court in all of these cases proceeded on the undoubtedly sound legal principle that if he who undertook to do the work was an independent contractor he could not obligate the employer contractually; if he was an agent he could do so.

If the finding of an independent contractor relation absolves the owners from liability for the contracts entered into by the contractor with third persons, and the finding of an agency relation subjects the owner to liability for the contracts entered into by the agent, then it follows that wherever such contractual liability has arisen there must have been an agency relation. In other words, the inevitable conclusion is that if the conduct of the representative results in contractual liability on the part of the principal, he is an agent.

Life insurance solicitors have authority to, and do, bind the company they represent contractually.

An insurance solicitor not only solicits applications but also delivers policies and collects the first premium therefor.\textsuperscript{45} An outstanding authority on insurance,\textsuperscript{46} in speaking of "special

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\textsuperscript{44} Kesler Const. Co. v. Dixson Holding Corp., 201 N. C. 1, 175 S. E. 843, 845 (1934).

\textsuperscript{45} Turner \textit{v.} Supreme Lodge K. P., 166 Okla. 286, 27 P. (2d) 612 (1933).

\textsuperscript{46} \textit{VANCE, INSURANCE} (2d ed. 1930), 418-419.
\end{flushleft}
agents”, which is the usual designation of solicitors, describes them as follows:

“The customary functions of such [soliciting] agents are to induce third parties to make application for insurance, to forward such applications as are made to the insurer, and to deliver policies issued upon the receipt of the first premium in cash. He may have, and frequently has, other powers given him, such as making a binding preliminary contract pending the acceptance or rejection of the risk.”

This same authority states that,

“The usual conditions to be found in applications for insurance are that the contract shall not become binding until the policy is delivered and the first premium paid. If . . . the agent is vested with some discretionary power in regard to the delivery, such as when he is instructed not to deliver unless the insured is in good health, (which is the usual situation), or if the insured is not entitled to claim possession of the policy until some condition has been fulfilled, as the payment of the first premium, (which is always true in life insurance business), in such cases the possession of the agent does not inure to the benefit of the insured, and there has been no sufficient delivery.” 47

It is clear from the foregoing that, in the ordinary situation, by delivering the policy and collecting the first premium, the solicitor performs the act which completes the making of a contract between the company and the assured. In other words, in making such delivery and collecting the first premium he binds the insurer contractually. Likewise, where he issues a binder receipt for a premium paid at the time the application is signed, he makes a binding contract on behalf of the insurer. Furthermore, it has been held that under certain circumstances a soliciting agent for a life insurance company can bind the company by extending time for payment of premium. 48

Also, a life insurance company is contractually bound by answers inserted by a solicitor into the application, even though false and incorrect, irrespective whether through the mistake, neglect, or fraud on the part of the agent, provided the applicant made true verbal answers to the solicitor. 49

47 Id. at 205-206, 210-213.
Finally, a solicitor is usually held to bind the company by any interpretation he may give to the questions asked in the application or by any knowledge he may acquire in the performance of his duties, in so far as it is material to the transactions in which he is acting for the insurer. 50

From the foregoing it is obvious that a life insurance solicitor, frequently referred to as a soliciting agent, a special agent, or a subagent, exercises extensive contractual powers on behalf of the company he represents. By the exercise of such powers he binds the company. In that respect he is in a different position from some commercial solicitors who may merely solicit orders without exercising any contractual powers on behalf of those for whom they solicit. 51 In view of the exercise of such contractual powers by him there can be no question but that the relation of the solicitor to the insurer is that of agent and not of independent contractor.

It is significant that in the numerous cases involving the right of a life insurance solicitor to bind the company contractually, not once has the position been taken by the insurer that the solicitor was an independent contractor. The usual defense in those cases was that the solicitor was the agent of the assured and not of the insurer. 52 It is also of significance that such outstanding authorities on insurance as Vance, Cooley, and Joyce, 53 do not even suggest that an insurance solicitor may be an independent contractor. They always speak of him as an agent. In other words, an insurance soliciting agent is just what his title imports, namely, an agent. This appears from the only factor which conclusively distinguishes an agent from an independent contractor, namely, the power to enter into contractual relations on behalf of the principal.

RECENT CASES CONSIDERED

The conclusion that life insurance solicitors are agents and not independent contractors is not in conflict with those tort liability and workmen's compensation cases in which the principal has been held not liable for injuries negligently inflicted by the agent

50 Vance, Insurance (2d ed. 1930) 418-419.
51 For a summary of such cases see notes, (1922) 17 A. L. R. 621, (1924) 29 A. L. R. 470, (1928) 54 A. L. R. 627 and cases therein cited.
53 Vance, Insurance (2d ed. 1930); Cooley, Briefs on Insurance (2d ed. 1929); Joyce, Law of Insurance (2d ed. 1917).
on third persons nor for injuries sustained by the agent. In order to correctly understand those decisions it is necessary to consider briefly the historical basis and the development of the respondeat superior doctrine. In considering those decisions it should be recalled, as has heretofore been pointed out, the relationship of principal and independent contractor on the one hand, and of principal and agent on the other, may exist concurrently.

The doctrine of respondeat superior had its origin under an economy that existed several hundred years ago and differed greatly from that of the present. Under that economy the master was the head of a household and, as a matter of public policy, was held responsible for everyone and everything in that household. The servant was a member of the household. As soon, however, as the economy changed to one in which the servant was no longer a member of the master's household the liability of the master was so limited that he was liable to third persons only for injuries inflicted by his servant within the scope of his employment. Under that economy the master was not usually represented by agents and solicitors in forming his contractual relations. Such as were formed were entered into by himself in person. With the concentration of wealth and control came the necessity for representatives to act on behalf of the corporation which had largely replaced the master. The corporation, from its very nature, could act only through agents. Also, the economy required a vast army of agents spread over the country, and in many cases over the world, for the purpose of establishing contractual relations on behalf of corporations doing a national and often an international business. Such representatives, both because of their distance from the principal, and the very nature of their work, are subject to very little control from the principal other than such as relates to the immediate act of forming contractual relations. The liability of the principal even for such acts is strictly limited. Such representatives frequently use the automobile for locomotion. The principal, as a matter of fact, frequently does not expressly authorize it and cannot, and does not, exercise control over its operation. The salesman, often at his own expense, selects and provides his own means of transportation. Hence, another limitation on the doctrine of the liability of a master for the torts of his servant, other than the one that the tort must have occurred while he agent was acting within the scope of his employment,

54 Infra, pages 911-924.
55 Supra, page 901.
56 Restatement, Agency (1933) §§ 143-211, 268-383.
became necessary. 57 As in every situation when a new factual situation calls for the limitation of old established legal principles in their application to new situations, what the result ought to be in a given case was evident before the reason therefore was understood. Courts frequently reach the correct result by basing the decision on a well recognized legal principle, in this case, the rule that the principal is not liable for the torts of an independent contractor, without recognizing that the rule is not applicable and that a new and changed economy calls for the articulation of a new rule. Instead of basing their decisions on the rule that a principal is not liable for the torts of an agent inflicted in connection with his means of locomotion unless such means were authorized expressly or impliedly by, and were potentially, at least, under, the control of the principal, the courts said that such an agent is an independent contractor. 58 What the courts meant was that the liability of the principal in such a case was no greater than if the agent were an independent contractor, or, where the facts warranted such a conclusion, that as to the operation of the automobile, but as to that only, the agent was an independent contractor. What was actually decided in those cases was that a principal was not liable for the torts of his agent under the respondeat superior doctrine, nor liable for injuries sustained by the agent, even though the injuries were inflicted or sustained while the agent was acting within the scope of his employment, unless the principal had control over the agent; not only over his activity in entering into contractual relations on behalf of the principal, but also over the physical details of his movements. Where there is no such control over the details of the agent's physical movements, even though the representative is a servant or agent, and even though he was acting within the scope of his employment, there is no liability. 59

In the Khoury case the owner of the automobile was concededly an employee. He used his own automobile in going to those places


where he was to perform services for his employer. The Court held that the employer was not liable for injuries sustained by the plaintiff when struck by the automobile of the employee.\(^6\)

As to agents, it was held in the *Aldrich case* \(^6\) that an agent who owns and operates an automobile to assist him in seeking his trade, and whose movements are in no way controlled by his employer, is, *with respect to the operation of the car*, an independent contractor, so that his employer is not answerable for injuries caused by his negligent operation.

Unfortunately, all too frequently, the reason for the decision of non-liability of the principal was stated to be that the agent

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\(^6\) In so holding the court said in its opinion:

"It is the contention of the plaintiff that as Parnell was an employee of the defendant and had a fixed weekly wage, with regular hours of employment, and was at the time of the accident on duty in accordance with the terms of his employment, he was a servant of the defendant at the time of the accident.

"... Neither is the fact that Parnell was an employee of the defendant and had no other employment decisive, for a person may be an agent or a servant as to one part of an undertaking, and an independent contractor as to other parts. In the present case the automobile was owned by Parnell. Although an owner may be employed as a servant to operate his automobile (Marsh v. Beraldi, 260 Mass. 225, 157 N. E. 347), the mere fact that a servant uses his own car in his master's business is not final. ... The defendant did not require or request Parnell to use his automobile in the business, but merely agreed with him that if he used it he would be paid the equivalent of what he would otherwise be required to pay for railroad or street railway fares. In this particular the case at bar is less favorable to the plaintiff's contention than is Pyyny v. Loose-Wiles Biscuit Company, 253 Mass. 574, 576, 149 N. E. 541, 542, for in that case the defendant agreed to pay the plaintiff 'so much per mile for the number of miles that he (the servant) operated said car for them in connection with his employment,' it thus appearing that the use of the automobile was expressly contracted for and not merely permitted.

"In the present case the sole interest of the defendant was that Parnell should be at places where the defendant had work to be performed, leaving the means of transportation to Parnell's decision and convenience, but limiting the liability for expense to the defendant to an amount equivalent to the fares of a common carrier. The defendant assumed no obligation to keep the automobile in repair; that duty rested upon Parnell, its owner. If he chose to use his car instead of traveling by a common carrier to go to a particular place, a finding would not be warranted that the defendant had any control over him in the operation of the car or responsibility for the condition of its brakes, lights or other parts.

"Upon the agreed facts, it is plain that the defendant cannot be held liable for injuries caused by the use of the automobile." 265 Mass. 236, 238, 164 N. E. 77, 78 (1928).

\(^6\) 206 Ala. 138, 89 So. 289 (1921).
was an independent contractor, when, what was really meant, was that in the particular situation the doctrine of *respondeat superior* did not apply. Even the Restatement of the Law of Agency, which recognizes the distinction between an agent who is also a servant and one who is not, when discussing the question of tort liability, speaks of the agent who is not a servant as an independent contractor. In other words, he is said to be an agent for purposes of contracting and an independent contractor when tort liability is involved. The only justification for the use of such language given is that his liability is the same as if he were an independent contractor. To put it otherwise, when so used the term independent contractor does not indicate a status or relation but a measure of tort liability. Such use of terms, it is submitted, is misleading. It is without justification, unnecessary, and tends to confuse. Actually, as heretofore shown, his status is that of agent irrespective of whether contract or tort liability is involved. He is an agent. However, his relation to his master as to his physical movements, especially in the use of an automobile not supplied or directly authorized by the principal, is not that of a servant; under certain circumstances, as to the operation of the automobile, but as to that only, he may be an independent contractor. As the master has no control over him in those movements the doctrine of *respondeat superior* is inapplicable. If the master were given or were to assume control over him as to such movements the doctrine of *respondeat superior* would apply even though he is an independent contractor. If a contract has been made between the principal and the agent relative to the use of an automobile to be supplied by the agent, then, as to the use of the automobile, but as to that only, the agent may be an independent contractor. He would be in the same position as a third party engaged to transport the agent on such terms as to make such third party an independent contractor.

In all of the cases involving tort or workmen's compensation liability the question is not whether the representative was an independent contractor or an agent. The question is whether or not the relation of the principal to the representative at the time of the injury was such that the doctrine of *respondeat superior* applies. If the representative is actually not an agent but an independent contractor obviously the doctrine does not apply. However, even if he is not an independent contractor but an agent,

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62 *Restatement, Agency* (1933) § 220, comment on subsection (1) (c).
63 Note (1924) 30 A. L. R. 1502, 1518 and cases cited.
the doctrine does not necessarily apply. It is further necessary that the agent was acting in the scope of his employment and that his physical acts were under the actual or potential control of the principal. Once this was realized it became obvious that the independent contractor test does not determine the question of liability, and, conversely also, that the existence or non-existence of liability in these cases does not indicate whether or not an independent contractor relation exists. The real test of liability is that of actual or potential control, not for the purpose of distinguishing between independent contractor and agent, but for the purpose of determining the question of liability irrespective of whether the relation of the one who inflicted the injury to the principal was that of servant, agent, or independent contractor. In the opinion in the case just cited the court carefully differentiated between the independent contractor defense and the defense that the use of the automobile had not been authorized by the principal. Said the court in another case which was a tort liability action:

"Whether Souther's relationship with his employer was one of independent contractor, or whether he was an agent or servant, or whether his engagement partook of both relations, is therefore not strictly determinative of his employer's liability. The decisive inquiry is whether the employer had any control over Souther in the management and operation of the latter's automobile."

It follows from what has been said that even though the person employing another to negotiate contractual relations may not be liable for the injuries sustained or inflicted by such other in the operation of an automobile employed to transport himself about, nevertheless, their relation is not necessarily that of contractor and contractee but may be that of principal and agent.

As to the two classes of life insurance solicitors herein considered, namely, solicitors of ordinary insurance and solicitors of industrial insurance, there is a small group of rather recent, well considered personal injury and workmen's compensation cases, some of which hold expressly that an insurance solicitor is not an independent contractor, some of which on cursory examination may seem to indicate a contrary conclusion but actually do not, and only one of which indicates an independent contractor relation. Because of the importance that undoubtedly attaches to them in any consideration of the question herein discussed, they will be gone into in considerable detail. All of these cases arose either out of personal injuries sustained by the plaintiff at the

hands of a solicitor in the act of traveling about his territory or out of injuries sustained by the agent himself in the same act. All were commenced against the insurance company on the doctrine of *respondeat superior*. So far as this discussion is concerned, unless otherwise stated, it can be assumed that at the time the solicitor was acting within the scope of his employment.

The first, *Fidelity Union Life Insurance Company v. McGinnis*, 67 was a suit to recover damages for personal injury sustained by the plaintiff at the hands of one Deen who solicited ordinary insurance for the defendant company. The jury found that at the time the automobile driven by Deen struck the plaintiff he was an agent and employee of the defendant and was on his way to procure an application for insurance in defendant company.

Deen owned the car which he was driving at the time of the accident and had the expense of operating and maintaining it. In behalf of the insurance company it was urged that Deen was an independent agent in the operation of the car, that the appellant had no authority to direct or control the operation of the same and had no concern with it under the contract between them; that therefore the doctrine of *respondeat superior* had no application. 68


68 The contract between the parties was in writing. It designated Deen as agent. It stated that he agreed to act under the control and instruction of the company, to use his best efforts, and devote his whole time to promote and make successful the business of the company in his district; to procure applications for the company exclusively; to collect the first annual premium and to deliver policies sent to him for that purpose in accordance with the terms and conditions governing such delivery; to pay the company all moneys collected immediately upon receipt thereof less any commission then due and payable thereon; and to render such other services in connection with business done through his agency as the company might request from time to time.

Another provision of the contract fixed Deen's compensation upon a commission basis. Deen testified that he collected for the company premiums from people whose working hours would not permit them to go to the central office. After admitting he struck the plaintiff he said he was on his way to see a man whose acquaintance he wanted to make for the purpose of securing insurance business for the company or health and accident business. He had been given the prospect's name by a friend and had been told that if he would arrive at a certain place at a certain time he could see him. He also testified that he worked under the company's city manager and took instructions from him in relation to his work for the insurance company. He also testified that he did not have regular office hours; he did not use his automobile to solicit business unless "it was plumb across town". He further stated that an automobile was very helpful to get a city insurance agent to see his prospects.
The court held that Deen was not an independent contractor but a servant or employee. Said the court in its opinion:

"Under this stipulation we have no doubt the company would have had the right to insist that Deen should use an automobile in the transaction of the business entrusted to him or that it could have commanded him not to use a car while so engaged. . . .

"The plain import of this contract is that the company had the right to control Deen in the details of his service."

The court held that he had implied authority to use a car, and also that at the time of the injury he was acting within the scope of his employment; that this was sufficient to establish liability on the doctrine of respondeat superior. This decision not only makes the solicitor an agent but also a servant and employee.

The next case, Dillon v. Prudential Insurance Company of America,69 was an appeal by the defendant from a judgment against it in an action brought to recover for personal injuries of the plaintiff alleged to have been caused by the negligence of one McDonald, a solicitor of industrial insurance, in operating his automobile while in the employ of the insurance company.

McDonald was soliciting and collecting under a contract which required him to give his entire time to the business of the company. He was to work eight hours each day; his duties were to collect premiums due upon insurance, solicit new insurance, deliver policies issued by the company, attend meetings of agents, etc. His district extended over an area of over 200 square miles. He was allowed to use any reasonable mode of conveyance in covering his territory. He was paid a regular weekly salary and a commission upon new business. The contract between the company and McDonald specified minutely the latter's duties; they were very numerous and required much traveling about and contact with many persons each day. On his way to attend a meeting of agents at about 9:20 o'clock one morning, McDonald injured the plaintiff by striking him with his automobile.

One of the contentions made by the plaintiff but rejected by the court, was that McDonald was not an agent but an independent contractor. This decision gives the solicitor of industrial insurance the status of an agent and servant.

The case of Wesolowski v. John Hancock Mutual Life Insurance Company,70 likewise, was a personal injury action involving an injury inflicted by an industrial insurance solicitor.

The John Hancock Mutual Life Insurance Company employed Adams to solicit life insurance business and to make weekly col-

69 75 Cal. App. 266, 242 Pac. 736 (1926).
70 308 Pa. 117, 162 Atl. 166 (1932).
lections of premiums. His salary was $15 per week plus commission on new business. His territory was less than a square mile in the City of Philadelphia. The company had the right to Adams' exclusive service and to fix his working hours. In covering his territory Adams sometimes walked and sometimes drove his own Ford car which he maintained and operated at his own expense. The company did not require him to use a car though the company superintendent, when informed that Adams had a car, said, "If you have one you might as well use it." On March 12, 1927, Adams was on his way in his car to make a collection for the company. While on his way he collided with a bicycle on which plaintiff was riding.

It was the position of the defendant that under the facts of the case it was not legally responsible for the negligence of Adams under the doctrine of respondeat superior. The trial court stated its decision as follows:

"While the general rule of law is that a principal is liable for the negligence of his agent while in the performance of the agent's duty, and the reason for the application of this rule is that the agent, during the performance of his duties is presumably under the direction and control of the employer, where, as here, the instrumentality used by the agent or employee is not furnished at the direction of the employer, or subject to the employer's direction or control, the employer should not be held responsible."

In affirming the decision of the trial court the following significant language was used:

"We affirm the decision and adopt the ruling of the court below. . . .

"To hold a master legally responsible for the act of a servant who is engaged in furthering his master's business, and who while doing so negligently uses some instrumentality that carries him from place to place, it must either be proved that the master exercised actual or potential control over that instrumentality, or the use of the instrumentality at the time and place of the act complained of must be of such vital importance in furthering the business of the master that the latter's actual or potential control of it at that time and place may reasonably be inferred."

The court did not decide in this case that Adams was not an agent and servant of the insurance company. It merely decided that, as to the operation of the automobile, the insurance company did not have sufficient direction and control so as to render it liable under the respondeat superior doctrine. Had the court been of the opinion that the solicitor was an independent contractor it would not have been called upon to decide whether or not the company had such control. Inferentially, therefore, at least, the court decided that non-liability on the part of the prin-
Principal for torts does not preclude the solicitor from being an agent and servant.

American Savings Life Insurance Company v. Riplinger was an action for injuries inflicted by one Owens on the plaintiff who sought to charge the company with liability on the respondeat superior doctrine. Owens solicited ordinary life insurance for the defendant company.

At the time Riplinger was injured, one Bannon had been induced by Owens to agree to take an assignment of a policy issued by the company which Owens had sold for it to one Smith. The paper evidencing the assignment was sent by the company to Owens, and it and the policy itself were to be delivered by Owens on the payment of the premium by Bannon. He was returning to his home for his dinner and for the purpose of procuring the assignment and the policy which he had previously left at his home, with the intention of having Bannon, in the afternoon, accept the assignment and pay the premium when he would deliver it to him and the policy to Smith. While making this trip in the automobile of his wife, Riplinger was injured by the automobile which Owens himself was operating. The premium on the policy was $200. Owens' commission was $120, and the company's portion of it was $80, which he intended to collect and remit to it. It was the custom, if not the contract, of Owens and the company for him to collect the premium and remit the company's portion. The contract between Owens and the insurance company did not appear in the record. It was admitted that the contract authorized Owens to sell, on commission, insurance for the company. It provided that he should not represent any other company during the life of the contract. The company reserved the right to terminate the contract or to discharge Owens. In the selling of insurance under the authority of his contract with the company Owens could go and come in any manner he chose. He did not have to drive an automobile in order to comply with his contract. He was not required by the company to do so. His mode or means of travel in the selling of insurance, whether on foot, by street car, or automobile, or other vehicle, was a matter left entirely to Owens. He was not furnished an automobile by the company. He received no compensation for the use of his wife's automobile, nor for his services, except a commission of each policy he was able to sell. He could go to work at whatever hour he desired and work as he desired, either day or night. The company did not exercise any control over the manner in which he should travel,

249 Ky. 83, 60 S. W. (2d) 115 (1933).
or as to where he should go or spend his time when selling or not selling insurance. It was left to him entirely as to how or when he would travel or where he would go to sell its policies. Notwithstanding his contract did not permit him to represent any other company, at the time of Riplinger's injury he represented more than one other insurance company, but was not engaged in dealing for another on that day.

Under that state of facts the court held that the insurance company was not liable for the injuries sustained by Riplinger.

While the court had much to say about independent contractors it is clear that it used those terms in a technical sense, i. e., as indicating no liability and that it did not intend to hold that in his relation to the insurance company generally Owens was an independent contractor and not an employee. What it did hold was that in the operation of his wife's automobile he was not subject to such control of his principal as to make the doctrine of respondeat superior applicable; as to this act, and this act only, he was an independent contractor.

That the foregoing was the holding of the court appears, first of all, from its recognition of the fact, put in its own language, that "a person may be a servant or agent as to one part of the undertaking and an independent contractor as to other parts." The court points out that the test of liability, to again use its own language, is "whether there was authority expressed or implied for doing the act which caused Riplinger's injury." It concludes, as appears from the facts, that the company had no control over the operation by Owens of his wife's automobile. That the court went no further than to hold that only in the operation of his wife's automobile was Owens an independent contractor appears from the quotation in its opinion from Wesolowski v. John Hancock Mutual Life Insurance Company.72

It will be recalled that the court stated in the Wesolowski case that assuming the solicitor was the agent of the company, there was no liability on the part of the company unless there appeared the situation set forth in the quotation just referred to from that case. Is it not a fair inference that the quotation by the court of said rule from the Wesolowski case indicates it considered it was dealing with a similar situation? Finally, the fact that Owens was subject to discharge at any time, the fact that he had been licensed by the Insurance Commissioner of Kentucky as an agent of defendant company, and the fact that he was to work exclusively for the company, according to the opinion, indicate an employee

72 Supra, page 915.
status. What the court says in this case as to independent contractor has reference merely to the operation of the automobile of his wife. It decided that as to this the defendant company exercised no potential control and therefore there was no liability. Consequently, it was not called upon to decide whether or not generally Owens was an employee. It did not decide, as that question was not before it, that he was an independent contractor as to the work itself which he was doing for the company, namely, soliciting insurance, delivering policies, and collecting premiums. As to this, according to his license from the Insurance Commissioner, he was an agent of defendant company. That he may have had the status both of servant and agent was admitted by the court.

The recent decision of some very interesting Texas litigation indicates conclusively why an insurance company is not liable on the respondeat superior doctrine in cases of this kind. Because of the importance of the litigation, the large amounts involved, and the three reported opinions, the facts are set forth in considerable detail.

Both the Denke and the Shepherd cases were for damages sustained by a minor plaintiff when struck by an automobile driven by defendant's insurance solicitor, Saunders.

The sole question in this litigation, as stated by the Commission on Appeals, was "as to whether or not at the time of the accident W. W. Saunders was acting in the capacity of a servant or employee of . . . the American National Insurance Company." Large judgments for both plaintiffs were sustained by both courts of Civil Appeals and both judgments were reversed by the Commission on Appeals and judgment in each case ordered for the insurance company. The opinion of the Commission on Appeals was adopted by the Supreme Court of Texas.

The Commission on Appeals adopted the statement of material facts made by the court of Civil Appeals in the Denke case which showed minute control over all details of soliciting and collecting.


"The evidence establishes that at the time of the accident the appellant was engaged in writing industrial insurance, with premiums payable weekly, and also regular old line insurance. It had in its employment about 25 or 30 agents who were engaged principally in soliciting new
insurance and collecting premiums on old policies. Saunders was one of such agents. For its purpose, the appellant had divided the City of Galveston into various blocks or territory called 'debits' and each of such agent was assigned to a 'debit'. Such agent was required to spend the first three days of each week in collecting the weekly premiums due on policies in his 'debit' and in locating prospects for new insurance. The remainder of the week was devoted to writing new policies. Saunders was under a written contract with the appellant by which he agreed, in part, as follows:

"2. Solicit new insurance and to collect premiums regularly every week. To obey the orders and to carry out the instructions of the company, and to use my best efforts to further its success.

"3. To keep true accounts of the business in such books as may be furnished by the company, and to remit to the home office, every week, at the time required, and on the form furnished by the company, a true account of all money received by me, with the cash received by me during each week less authorized deductions.

"4. To pay all charges incident to sending moneys and parcels, postage, license or bond fees, and all other charges necessary to carrying on the business of my agency.'...

"Said contract further provided that 'The agent will be paid a salary as follows: 15% of the amount collected each week on the debit', in addition the agent was allowed certain commissions on all new policies written by him and certain other commissions on the net increase of business in his debit. The commissions due him were not retained by him out of collections made, but all such collections were turned in to the company, and the agent was paid the amount due him on each Saturday. The company could discharge him at will without notice. There was evidence to the effect that such agents were required to distribute literature in their territory advertising the business of the company. They were required to report to the office of the company at 7:30 each morning for the purpose of receiving a list of the premiums to be collected and instructions with reference to their work. They were divided into groups of 6 or 7 each, and each group was under the supervision of an assistant superintendent. At these meetings, called staff meetings, the superintendent first gave general instructions and then each assistant superintendent gave more definite instructions to his group with reference to how to collect the premiums and write new insurance. If any agent reported that he had failed to make certain collections, the assistant superintendent would give directions as to how to make collections. Each agent was given a list of the premiums to be collected, together with the route to be followed or the order in which the debtors were to be called upon. Thursday, Friday and Saturday of each week was devoted to writing new insurance. On these days, after attending the staff meeting in the morning, the agent went to work at 8 a.m., and worked until 11 a.m., and began work again at 1 or 1:30 in the afternoon and worked until 4 or 5 o'clock. He was required to attend another staff meeting at the offices at 5:30 p.m. After receiving instructions at the evening staff meetings and after eating their dinners, the agents were required to return to the field of their work and solicit insurance for a few hours. Some-
From the *Shepherd case*\(^7\) in the Court of Civil Appeals it further appears "that it was the intention of Saunders after having seen prospects he was on his way, at the time of the accident, to go to a 5:30 staff meeting." Also that under the contract Saunders was not permitted to resign without giving 7 days previous notice in writing and in case of resigning the agency or being dismissed therefrom, he agreed to introduce a successor to all policy holders in his agency after such resignation or dismissal, if requested to do so by the company. There was a provision to the effect that the amount of special salary to be paid should amount to no more than the quality of the business in the opinion of the company would warrant. It further provided that upon termination of the contract nothing further should become due Saunders.

The Commission on Appeals stated that the insurance company seriously questioned the statement that Saunders had frequently used his wife's car "with the knowledge and acquiescence of appellant ", and it further called attention to the fact "that there was nothing in the contract, either actually or as construed by the parties, which in any way sought to control Saunders in his physical movements while doing his work, or directing that he should or should not travel by automobile, street car, cab, or on foot or otherwise."\(^2\)

In the *Denke case* before the Court of Civil Appeals, the insurance company contended that the undisputed evidence established that Saunders was an independent contractor and not its servant. In the *Shepherd case* before the Court of Civil Appeals the insurance company in its answer especially pleaded that

Saunders was not the agent and employee of the defendant at
the time he caused the injuries complained of in the petition, but,
on the contrary, was an independent contractor over whom
defendant exercised no control or supervision of any kind in
the mode or manner of his soliciting life insurance for defendant
or collecting premiums due defendant. It further pleaded that
defendant exercised no right of control over any means of con-
veyance or transportation furnished by said party, and had no
right to exercise any such control, and that the automobile which
was used by said party at the time of the injury complained of
by the plaintiff and by which instrumentality the injury com-
plained of was inflicted, was not under the control, direction or
supervision of the defendant. It was further alleged in the
answer that defendant did not pay any of the operating expenses
of said automobile, nor make any reimbursement therefor, that
defendant did not require nor consent to the use of the automobile,
nor authorize its use in defendant's business either expressly or
impliedly, and had no right or authority to control, or exercised
control, over the automobile in its operation; that the alleged
agent was using the automobile at the time in question for his
own convenience and comfort.

The jury found in substance that Saunders, at the time the
boy was struck by the automobile and injured, was in performance
of a duty within the scope of his employment.

The Court of Civil Appeals affirmed the judgment in favor of
the plaintiff in the Denke case on the ground that the amount of
control exercised over Saunders made him a servant. The court
of Civil Appeals in the Shepherd case held that at the time
plaintiff was injured Saunders was engaged in the performance
of the work of his employment in furtherance of appellant's
business. It stated that "the provisions of the contract state
and clearly show the existence of the relation of master and
servant." It further stated that "if the act complained of is
done within the scope of the general authority of the servant, in
furtherance of the master's business and for the accomplishment
of the object for which the servant is employed, the master is
liable."

In order to determine just what rule is to be deduced from the
three decisions in these cases it is also necessary to have the
essential parts of the opinion of the Commission on Appeals.

In its opinion the Commission on Appeals stated that Saunder's
contract with the company was one of agency; that while there
were numerous provisions in the contract which indicated con-

trol over Saunders, they related merely to the contractual features of his employment, and not to the physical details as to the manner of performance of his movements while soliciting, collecting, attending meetings, etc. Falling short in the last particular the control was not such as to create liability on the part of the company for Saunber’s negligent acts in the operation of his wife’s automobile, although at the time he was engaged in the furtherance of the company’s business.78

Various decisions are then quoted from, including, Wesolowski v. John Hancock Mutual Life Insurance Company79 and American Savings Insurance Company v. Riplinger.80

The court quotes with approval from the Restatement of the Law of Agency the following:

“A servant is defined as a person employed to perform personal services for another in his affairs, and who, in respect to his physical movements in performance of the services is subject to the other’s control or right of control, while an agent is defined as a person who represents another in contractual negotiations or transactions akin thereto.”

The reason assigned for the importance of making the distinction is that an agent who is not at the same time acting as servant cannot ordinarily make his principal liable for incidental negligence in connection with the means incidentally employed to accomplish the work entrusted to his care.

The court concludes its opinion as follows:

“As pointed out in a statement of the case, the contract in this instance gave plaintiff in error no control over the manner and means adopted by Saunder’s in the performance of his work, and left him free to choose any mode of travel which might seem to him best. He owned no automobile, and was furnished none by the company, and only at times used his wife’s car for transportation. Most frequently he went on foot or by other means. Tested by principles above announced, we are inescapably driven to the conclusion that there was no control over him by plaintiff in error in the matter of the physical movements in the accomplishment of his work, and consequently plaintiff in error was not liable for his negligent acts in operation of the automobile.”

To summarize the three decisions: The opinions of the Court of Civil Appeals in the Denke case and in the Shepherd case are to the effect that Saunders was a servant and not an independent contractor. The opinion of the Commission on Appeals is to the

79 308 Pa. 117, 162 Atl. 166 (1932).
80 249 Ky. 83, 60 S. W. (2d) 115 (1933).
effect that Saunders was an agent and controlled extensively in the contractual features of his employment, but that as to his physical movements in operating the automobile he was not under such control of the insurance company as to render the company liable. What actually was decided was that in the operation of his automobile Saunders was not under such control of the company as would render it liable under the respondeat superior doctrine.

How do these decisions effect the question of whether a life insurance solicitor is an employee or an independent contractor? None of the three cases hold, nor is it anywhere stated in the opinion, that the solicitor was an independent contractor. Two of the opinions make him a servant, the final opinion makes him an agent and distinguishes between his activity on behalf of the company in connection with the insurance business and his physical movements in getting about in connection with his work. However, he is conclusively held an agent and not an independent contractor. A fair inference is that had the court been called upon to decide the question, it would have found that, because of the extensive control as to the contractual features of his employment, he was that type of agent who is also a servant.

A Massachusetts case,\(^1\) arising out of a workmen's compensation claim against the company on the part of one engaged in soliciting ordinary insurance, which presented the same question raised in the cases just discussed, was decided on the ground that the injury could not have been contemplated as a result of the employment, and that, therefore, the accident was not one arising out of and in the course of the employment of the plaintiff. The court held that it was unnecessary to decide whether plaintiff was an employee within the meaning of the Workmen's Compensation Act. The case, therefore, is of no help in determining whether an insurance solicitor is an employee.

A Nebraska case,\(^2\) arising out of a personal injury inflicted by the solicitor of the company on the plaintiff, is not in point because the solicitor devoted only a small part of his time to the insurance solicitation. Also, the accident occurred after he had completed a conference relative to an insurance application and after he had returned from his deviation to the route which took him home from a trip he had made in pursuit of his regular full time employment.

In a Connecticut workmen's compensation case 83 and in a Massachusetts workmen's compensation case, 84 both arising out of claims for injuries to insurance solicitors, the court assumed the relation of employee and employer.

In a Missouri case 85 where recovery was sought for injuries inflicted by an insurance solicitor with an automobile furnished by the employer, the employer-employee relation was assumed. The court absolved the employer from liability on the ground that at the time plaintiff was injured the solicitor was not acting in the scope of his employment.

Only a single case, a workmen's compensation case, 86 has been found which is authority for the proposition that an insurance solicitor is an independent contractor. The decision appears to be based on an erroneous interpretation of American Savings Life Insurance Company v. Riplinger. 87 Also, the facts are very different. The solicitor in the Mitchell case was shot while talking to a negro woman just within her house where he had gone to make a collection for the insurance company. The court absolved the company from liability. The only possible explanation of the decision is that while the court professed to be bound by the finding of fact of the trial court, it actually believed the testimony of the negress to the effect that Mitchell had criminally assaulted her.

It thus conclusively appears that only a single case is out of harmony with the conclusion that a life insurance solicitor of the type herein discussed is not an independent contractor. All the other cases, and no other ones have been found, in express terms or inferentially, hold that the type of life insurance solicitor herein dealt with is an agent and servant, or at least an agent.

LIFE INSURANCE AGENTS ARE EMPLOYEES

From what has gone before it conclusively appears that a life insurance salesman or solicitor is an agent and not an independent contractor. The various tests discussed are indicative of this result. The one conclusive test, namely, whether or not he repre-

84 Moran’s Case, 234 Mass. 566, 125 N. E. 591 (1920).
87 249 Ky. 83, 60 S. W. (2d) 115 (1933).
sents his principal for the purpose of establishing contractual relations on his behalf with third persons, shows conclusively he is an agent and not an independent contractor. The actual decisions involving the liability of the insurance company for torts of, and injuries to, the solicitor, with only one single exception, are in accord with that conclusion. It now remains to decide whether or not an agent is an employee in order to determine whether he is within the provisions of Section 210 (b) of the Social Security Act,88 which provides:

"The term 'employment' means any service of whatever nature, performed within the United States by an employee for his employer," [with certain specified exceptions].

There can be no question but that the words "service of whatever nature" are sufficiently broad to include the services rendered by the life insurance solicitor to his employer. Neither can there be any question but that if the solicitor is an employee then whoever he works for is "his employer" even if we adopt a restricted definition of the term "employer". The final question to be determined, therefore, is whether or not a life insurance solicitor, who, it has been decided, is an agent, is an employee.

From the fact that those who drafted the act used the terms "employer" and "employee" instead of the well known and long used technical terms "master and servant" it is obvious that they intended something either more inclusive or less inclusive than what is understood by the terms of "master and servant". No authority can be found for ascribing to the term "employee" a more narrow or restricted meaning than is assigned to the term "servant". At least, therefore, the terms "employer" and "employee" are sufficiently broad to include the common law master-servant relation. If this is true then, as to those agents who are also servants, there is no question but that they are employees. This, it is believed, includes all, or practically all, of the solicitors included within the scope of this paper. The various tests discussed are those for determining whether or not one is a servant or an independent contractor. They are either inconclusive or strongly indicate a master-servant relation.89 The rule that as to an ancillary part of one's work one may be an independent contractor without effecting one's general status, applies to employees as well as agents.90 There-

89 Supra, pages 896-901.
fore, the fact that as to the operation of his automobile the solicitor is an independent contractor, is as consistent with the relation of agent and servant as with the relation of agent only. None of the insurance solicitor tort and workmen's compensation cases discussed in detail hold that the solicitor belongs in the class of agents who are not servants. In most of them he is referred to as a servant or agent; in some as servant. From the amount of control that is exercised over the industrial solicitor, as appears from the facts of those cases dealing with such a solicitor, the conclusion is inescapable that he is a servant and therefore without doubt an "employee".

The same applies, although possibly not quite so obviously, to the solicitor of ordinary life insurance. He is controlled by rules and regulations of the company in his operations. True, he is often specifically given the discretion to decide whom to solicit and when and where within his territory. To one familiar with the life insurance business the reason for this is obvious. It is not for the purpose of making him an independent contractor, but, as has heretofore been indicated, because the only way a company has of getting prospects is through its agents. Hence, they cannot direct the agent whom he is to solicit. Also, in order to solicit successfully the agent must accommodate himself to the wishes of the prospect as to time and place. Hence, it is impossible for the company to exercise any control over these three factors and they are, therefore, necessarily left to the agent. It has been held that a "certain amount of freedom of action [is] inherent in the nature of the work [of soliciting insurance] . . . but this [does] not change the character of employment."  

Finally, even assuming for the sake of argument, that some solicitors included within the scope of this paper belong in the group who are agents but not servants, this does not prevent them from being "employees". It has been conclusively shown that they are not independent contractors. Since there are only the two groups, namely, employees and independent contractors, and they have been held not to belong to the latter group, they must be included in the former. Indeed, it seems probable that one reason why the term "employee" is used in the Social Security Act, rather than the more or less technically restricted term "servant", is because it was intended to include all who are not independent contractors irrespective of whether or not they are technically "servants".

91 Supra, pages 911-924.
92 Supra, page 895.
93 Cameron v. Pillsbury, 173 Cal. 83, 159 Pac. 149 (1916).
The interpretation of the term "employee" as inclusive of agents who are not servants as well as of those who are is in accord with the interpretation in the act itself of the same term as inclusive of the officers of a corporation. Another subsection prohibits the application of the principle *enumeratio unius est exclusio alterius.* There is good authority to the effect that the term "employee" ordinarily does not include officers of a corporation. Nevertheless the broader interpretation has been adopted by the act. If the term includes officers it should also include agents.

The trend appears to be from a somewhat restricted to a decidedly more inclusive use of the term employee. A number of cases, in addition to those hereinbefore discussed, hold that an agent is an employee.

In the *Aisenberg case,* a California decision, the court held that an agent is an employee. The workmen's compensation act of California defines an employee as "any person who has entered into or works under any contract of service or apprenticeship with an employer. In the *Lawler case* the court said:

"The word 'employee' is of broad significance, including any person who gives his time for hire."

In the *Cortland case* and in the *Van Santvoord case* the term "employee", as used in a New York statute giving prefer-
ence in case of appointment of a receiver, was held to include a traveling salesman, i.e., an agent, on an annual salary. In the Luxton & Black Co. case\textsuperscript{103} it was so held relative to an agent paid both a salary and a commission. In the Smith case\textsuperscript{104} and in the Ginsburg case\textsuperscript{105} it was held that an agent selling on commission only is an employee. The term appeared in a statute giving preference to certain persons when an assignment for the benefit of creditors occurred.

In the Lowry case\textsuperscript{106} the deceased, Lowry, was employed by the Padgitt Company as a traveling salesman on a commission basis. His duties were such as are ordinarily incident to such work. He traveled both on the train and in an automobile, principally the latter. In covering his territory he did not travel under the direction of the Padgitt Company. The company did not instruct him when and where to go. Lowry used his own automobile. He paid all his expenses incident to his traveling. He used his own discretion and judgment as to how and when he should travel, and as to where he should travel in the territory in question. There was nothing in his contract which precluded or prevented him from representing any other company or carrying any other line that he might decide to handle. Lowry fixed his own time, and when and where he should travel in the territory in question. Prices and terms were to be made by the Padgitt Company at all times; Lowry had nothing to do with making the prices. His sales were made and orders taken subject to the approval of the company. He was held an employee within the following definition of the term:

" Every person in the service of another under any contract of hire."

Said the court:

"In view of the facts that Lowry was performing the usual and customary services for his employer as a traveling salesman, and that he was not doing any specific piece of work, nor undertaking the production of any given result . . . and that there is evidence that he was actually controlled by his employer in the performance of his employment, such as the soliciting of orders, the prices at which he should sell, the allotment of specific territory, and the approval and consummation of his sales by his employers, these are decidedly characteristic of the services of an employee."

\textsuperscript{103} 35 App. Div. 243, 54 N. Y. Supp. 778 (4th Dep't 1898).
\textsuperscript{104} 59 N. Y. Supp. 799 (Sup. Ct. 1899).
\textsuperscript{105} 27 Misc. 745, 59 N. Y. Supp. 656 (Sup. Ct. 1899).
\textsuperscript{106} 231 S. W. 818, 822 (Civ. App. Tex. 1921).
Life insurance solicitors who devote all their working time to soliciting life insurance and solicit for only one company are agents and not independent contractors; most, if not all, of the kind of life insurance solicitors dealt with herein belong to that class of agents who are also servants; irrespective of whether they do or do not belong to that class of agents, they are employees within the meaning of that term as it is used in Section 210(b) of the Social Security Act.107

JUDICIAL CONTROL AND THE COMMUNICATIONS COMMISSION

JOSEPH E. KELLER *

"In the estimation of English-speaking people generally, a right of review is no less sacred than the right to be heard in the first instance." †

JUDICIAL CONTROL as related to the Federal Communications Commission is one of the most interesting instances of changing relations between courts and independent agencies established by Congress under its administrative organization. Here we have a federal commission which, in its early history, was seriously considered as being exempt from all judicial control. It then received a peculiar procedure for judicial review and today enjoys the distinction, or suffers the ignominy, depending entirely upon one's point of view, of two systems of appeal.

The Federal Communications Commission was established by the Communications Act of 1934, which repealed the Federal Radio Act of 1927. When the Senate was debating this original Federal Radio Act of 1927, it was not intended to provide any court review of the actions of the Federal Radio Commission set up by the Act. Senator Bratton, however, said in his debate: "I am unwilling to put within the power of the Commission the right to dispose of a matter involving millions of dollars and deprive citizens or corporations of any way to secure redress through judicial proceedings. I think it is a dangerous policy and might lead to extremely bad results." Senator Cummins of Iowa did not agree with this viewpoint, but he based his contentions upon the concept that the Commission which was about to be established was merely a fact-finding body. When it attained the full vigor of an administrative body, the Congress quickly provided for judicial review.

* A. B., University of Dayton (1928), LL. B., Id. (1930), J. D., Georgetown University Law School (1935); Member of the Bar of Ohio and the Bar of the Supreme Court of the United States; administrative assistant to Commissioner Brown, Federal Communications Commission. Author of Federal Control of Defamation by Radio (1936) 12 Notre Dame Lawy. 15, 134.
2 44 Stat. 1162 (1927).
The appeal section 4 written into the law by Congress provided as follows:

"(a) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a station license, or for renewal of any existing station license, or for modification of an existing station license, whose application is refused by the Commission.

(2) By any licensee whose license is revoked, modified or suspended by the Commission.

(3) By any other person, firm or corporation aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application or by any decision of the Commission revoking, modifying, or suspending an existing station license.

Such appeal shall be taken by filing with said court, within 20 days after the decision complained of its effective, notice in writing of said appeal and a statement of the reasons, therefore, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington.

"(b) The Commission shall thereupon immediately, and in any event not later than 5 days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person, firm, corporation shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person, firm, or corporation to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within 30 days after filing of said appeal the Commission shall file with the Court the originals or certified copies of all papers and evidence presented to it upon the application involved or upon its order revoking, modifying, or suspending a license, and also a like copy of its decision thereon, and shall within 30 days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons, firms, or corporations to whom it has mailed or otherwise delivered a copy of said notice of appeal.

"(c) Within 30 days after the filing of said appeal any interested person, firm, or corporation may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person, firm or corporation who would be aggrieved or whose interests would be adversely affected by a reversal or modi-

4 46 Stat. 844 (1930); 44 Stat. 1169 (1927).
fication of the decision of the Commission complained of shall be con-
sidered an interested party.

"(d) At the earliest convenient time the court shall hear and deter-
mine the appeal upon the record before it, and shall have power, upon
such record, to enter a judgment affirming or reversing the decision
of the Commission, and, in event the court shall render a decision and
enter an order reversing the decision of the Commission, it shall remand
the case to the Commission to carry out the judgment of the court:
Provided, however, that the review by the court shall be limited to
questions of law and that findings of fact by the Commission, if sup-
ported by substantial evidence, shall be conclusive unless it shall clearly
appear that the findings of the Commission are arbitrary or capricious.
The court’s judgment shall be final, subject, however, to review by the
Supreme Court of the United States upon writ of certiorari on petition
therefore under Section 347 of title 28 by appellant, by the Commission,
or by any interested party intervening in the appeal.

"(e) The court may, in its discretion, enter judgment for costs in
favor of or against any appellant, and/or other interested parties inter-
vening in said appeal, but not against the Commission, depending upon
the nature of the issues involved upon said appeal and the outcome
thereof: Provided, however, that this section shall not relate to or
affect appeals which are filed in said Court of Appeals prior to July 1,
1930." 6

The appeal section of the 1927 law was clouded in obscurity 6 and
consequently was never workable until after it had been
amended. The purpose of the amendment, which was created in
1930, was to clarify the procedure on appeal to the court from
decisions of the Federal Radio Commission, to define more clearly
the scope of the subject matter of such appeals and to provide
for a review of the Court of Appeals of the District of Columbia
by the Supreme Court. 7

Earlier attempts at regulation of broadcasting give the general
background reflecting the importance of the problem involved
here. The first federal law having any relation to radio commu-
nication was the Act of 1910, relating solely to safety of life at sea. 8
This law was amended on August 13, 1912, the amendment being
entitled “An Act to Regulate Radio Communication.” 9 It simply
required the obtaining of a federal license before engaging in
any form of interstate or foreign communication by radio, the
license to be granted by the Secretary of Commerce.

5 46 Stat. 844 (1930).
7 67 Cong. Rec. 11641 et seq.; id. at 4595 et seq. (1926); 68 Cong. Rec.
2339 et seq.; id. at 3483 et seq. (1927).
9 37 Stat. 302 (1912).
There arose under this Act the question as to whether the Secretary of Commerce could exercise any discretion in the issuing of licenses, or whether he was under the mandatory duty of granting them to all applicants. An applicant, desiring to operate a station for transatlantic telegraph communication at Sayville, Long Island, was refused the license, although organized under the laws of New York, because the then Secretary of Commerce had reason to believe that said corporation was controlled by German capital and Germany did not permit similar American owned corporations to operate in that country. The Secretary of Commerce also submitted to the then Attorney General the question whether, under the 1912 Act, he had the necessary authority to refuse to license the station on this ground.

The Attorney General held that he had not, stating that the Act did not repose any discretion in the Secretary of Commerce as to the granting of licenses if the applicant came within the class to which licenses were authorized to be issued. Again in 1921, Herbert Hoover, as the Secretary of Commerce, refused a license to an applicant operating a station in New York City, because the apparatus used was such that it caused serious interference with other communications. The applicant, Intercity Radio Company, brought a mandamus proceeding against Secretary Hoover to require him to issue the license on the ground that the duty of issuing it was purely ministerial.

The court held that under the Act of 1912, the Secretary of Commerce had no right to withhold a license from the applicant to operate its apparatus for radio communication.

The first appeal to be taken under Section 16 of the Radio Act of 1927 grew out of the general reallocation in 1928 under General Order No. 40 of the Commission. Station WGY at Schenectady, New York, for some time before the reallocation had been operating unlimited hours on one of the frequencies designated by this Order as a "high-power frequency". The reallocation reduced the hours of operation to limited time and the station appealed from this decision. The Court of Appeals of the District of Columbia held that the refusal of the Commission to renew the license of Station WGY, except as modified with respect to hours of operation, was in fact a denial of its application within the

terms of the Radio Act of 1927.\textsuperscript{12} It was likewise contended by applicant in this appeal that the action of the Commission in limiting the hours of operation of Station WGY deprived it of its property rights without due process of law and without just compensation, contrary to the Fifth Amendment of the Constitution of the United States. The Court held that under the Commerce Clause of the Constitution, Congress had power to provide for reasonable regulation of the use of and operation of radio stations and to create bodies such as the Federal Radio Commission to carry such legislation into effect.

The Commission made application to the Supreme Court of the United States for a writ of certiorari,\textsuperscript{13} which was denied on the ground that the Supreme Court can only review "cases and controversies" within the meaning of Section 2 of Article 3 of the Constitution and that the Court of Appeals of the District of Columbia, under Section 16 of the Radio Act of 1927, was acting in an administrative and not a judicial capacity.

The amendment referred to heretofore followed this decision. Thereafter, review by the Court of Appeals of the District of Columbia was limited to questions of law; the findings of fact by the Commission, if supported by substantial evidence, are made conclusive unless clearly shown to be arbitrary and capricious. The judgment of the Court of Appeals of the District of Columbia is made final, subject to review by the Supreme Court of the United States on a writ of certiorari.

The second case presented to the Court of Appeals under the original Section 16 of the Radio Act of 1927 was the\textit{Technical Radio Laboratory case},\textsuperscript{14} in which the question of property rights in the use of the ether was squarely presented. The quasi-legislative power of the Commission to make rules of general application, though they limit private property rights, was sustained by the Court of Appeals of the District of Columbia in the\textit{Carrell case}.\textsuperscript{15} A host of petitions to the Court of Appeals of the District of Columbia under this section of the Act followed, many of which raised no new questions of law.

Under the original Section 16 of the Radio Act of 1927, the right of appeal was limited to the petitioner whose application had been denied. The amendment to this section, as outlined above,

gives the right of appeal to any applicant for a station license renewal or modification thereof and, in addition, to any licensee whose license is revoked, modified or suspended by the Commission, and to any other person, firm, or corporation aggrieved, or whose interests are adversely affected by any decision of the Commission revoking, modifying or suspending an existing station license.

The Milwaukee Journal case 16 was the first one taken under the revised Section 16. The appellant in this case contended that it was adversely affected by a decision of the Commission granting an application for modification of station license seeking an increase in power output of a station licensed for operation on the same frequency to which appellant's station was assigned.

The United States Supreme Court has aptly and amply summed up the position of the court under this section of the Act in the Nelson Brothers Bond and Mortgage Company case. 17 The language of the Court is explicit in its summary:

"Respondents challenge the jurisdiction of this Court. They insist that the decision of the Court of Appeals is not a 'judicial judgment', that for the purpose of the appeal to it, the Court of Appeals is merely a part of the machinery of the Radio Commission and that the decision of the Court is an administrative decision. Respondents further insist that if this Court examines the record, its decision 'would not be a judgment, or permit of a judgment to be made in any lower Court, but would permit only consummation of the administrative function of issuing or withholding a permit to operate the station.'

"Under section 16 of the Radio Act of 1927, the Court of Appeals, on appeal from decisions of the Radio Commission, was directed to 'hear, review and determine the appeal' upon the record made before the Commission, and upon such additional evidence as the Court might receive, and was empowered to 'alter or revise the decision appealed from and enter such judgment as it may seem just: 44 Stat. 1169'. This provision made the court a 'superior revising agency' in the administrative field and consequently its decision was not a judicial judgment reviewable by this court. Federal Radio Commission v. General Electric Co., 281 U. S. 464, 467. The province of the Court of Appeals was found to be substantially the same as that which it had, until recently, on appeals from administrative decisions of the Commissioner of Patents. While the Congress can confer upon the Courts of the District of Columbia such administrative authority, this court cannot be invested with jurisdiction of that character whether for the purpose of review or otherwise. It cannot give decisions which are essentially legislative or administrative. Id. pp. 468, 469. Keller v.


"In the light of the decision in the General Electric case, supra, the Congress, by the Act of July 1, 1930, c. 788, amended section 16 of the Radio Act of 1927 so as to limit the review by the Court of Appeals, 46 Stat. 844; 47 U. S. C. 96. That review is now expressly limited to 'questions of law' and it is provided that 'findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious.' This limitation is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such decision as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review. Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action are appropriate questions for judicial decision. These are questions of law upon which the court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. An inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiates, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wishes or expediency of the administrative action. Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547, 548; New England Divisions Case, 261 U. S. 183, 208, 204; Keller v. Potomac Electric Power Co., supra; The Chicago Junction Case, 264 U. S. 258, 263, 265; Silberschein v. United States, 266 U. S. 221, 225; Ma-King Products Co. v. Blair, 271 U. S. 479, 483; Federal Trade Commission v. Klesner, 280 U. S. 19, 30; Tagg Bros. v. United States, 280 U. S. 420, 442; Federal Trade Commission v. Raladam Co., 283 U. S. 643, 654; Crowell v. Benson, 285 U. S. 22, 49, 50.

"If the question of law thus presented was brought before the court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceedings. But that character is not altered by the mere fact that remedy
is afforded by appeal. The controlling question is whether the function to be exercised by the court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not 'be misled by a name, but look to the substance and intent of the proceeding.' United States v. Ritchie, 17 How. 525, 534; Stephens v. Cherokee Nation, 174 U. S. 445, 479; Federal Trade Commission v. Eastman Co., 274 U. S. 619, 623; Old Colony Trust Co. v. Commissioner, 279 U. S. 716, 722, 724. 'It is not important', we said in Old Colony Trust Co. v. Commissioner, supra, 'whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law.' Nor is it necessary that the proceeding to be judicial should be one entirely de novo. When on the appeals as here provided, the parties come before the Court of Appeals, to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power. The provision that, in case the court reverses the decision of the Commission, 'it shall remand the case to the Commission to carry out the judgment of the court' means no more than that the Commission in its further action is to (be guided and) respect and follow the court's determination of the questions of law. The procedure thus contemplates a judicial judgment by the Court of Appeals and this court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous. Osborn v. United States Bank, 9 Wheat. 738, 819; In Re Pacific Railway Commission, 32 Fed. 241, 255; Federal Trade Commission v. Klesner, supra; Federal Trade Commission v. Raladam Co., supra; Old Colony Trust Co. v. Commissioner, supra.'

The General Electric Co. case and the Nelson Brothers Bond and Mortgage Company case are the two most important decisions, concerning radio, handed down by the United States Supreme Court.

President Franklin D. Roosevelt, on February 26, 1934 sent a special message to Congress, in which he recommended that "the Congress create a new agency to be known as the 'Federal Communications Commission', such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission—the services affected to be all of those which rely on wires, cables, or radio as a medium of transmission."

20 78 Cong. Rec. 3259 (1934).
Into the Communications Act of 1934 was written Section 402 with its dual system of appeals. This legislation was designed to serve the convenience of those who came within the purview of the Act. The purpose was stated by Senator Dill, in introducing the new legislation on the floor of the Senate, on May 15, 1934: "... we provide that where the decisions of the commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or the permit, or whatever it may be, comes to the commission and asks for a change in his license or asks for a new license, or asks for something to be done by the commission, then if the commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia." The specific language of the section is as follows: "The provisions of the Act of October 22, 1913 (38 Stat. 219) relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license or for modification of an existing radio station license), and such suits are hereby authorized to be brought as provided in that Act." 21 It is evident, therefore, that the present appeals section, so far as radio cases are concerned, is substantially the same as it was under the Radio Act of 1927.

Section 402 of the Communications Act of 1934, then, incorporates by reference the machinery now provided by the District Court Jurisdiction Act of October 22, 1913, 22 for court test of orders.

Let us examine, then, the provisions of the Interstate Commerce Act 23 relating to appeals, since this matter has been incorporated by reference in the present appeals section of the Communications Act. Prior to the creation of the Commerce Court by the Mann-Elkins Act, approved June 18, 1910, 24 jurisdiction to enforce obedience to orders of the commission under the Interstate Com-

21 The remainder of the language of Section 402 is identical with Section 16 of the Radio Act of 1927 as previously set out in the text.
merce Act, and, subsequent to the Hepburn Act of June 29, 1906,\textsuperscript{25} to restrain enforcement of such orders, was vested in the circuit courts of the United States. That jurisdiction was abrogated concurrently with the establishment of the Commerce Court and the vesting in that court of exclusive original jurisdiction of such cases and of certain other specified kinds of cases in which jurisdiction had heretofore been vested in the circuit courts. Codification, revision, and amendment of the laws relating to the judiciary by the Judicial Code of March 3, 1911,\textsuperscript{26} effected repeal of the provisions of the Commerce Court Act relating to the Commerce Court and reenactment thereof of that code, without material change in substance, but some in rearrangement in text.\textsuperscript{27}

The Commerce Court was abolished from and after December 31, 1913, by the Urgent Deficiencies Appropriation Act, approved October 22, 1913,\textsuperscript{28} sometimes called the District Court Jurisdiction Act, which, without in terms amending existing statutes, transferred to and vested in the several district courts of the United States the jurisdiction heretofore vested in the Commerce Court and repealed "all acts or parts of acts insofar as they relate to the establishment of the Commerce Court." The venue of suits in the district courts to enforce or suspend the orders of the Commission was specified, the procedure in the cases in which the district courts were given jurisdiction was made the same as that provided for the Commerce Court, including the right of direct appeal to the Supreme Court, issuance of interlocutory injunctions restraining enforcement of the Commission's orders was limited to a three-judge court, with provision for direct appeal to the Supreme Court of the United States, similar appeal from a final judgment or decree of the district court was provided, provision was made for the disposition of cases pending at the date of the passage of the act and of the records and files of the Commerce Court, and "all laws or parts of laws inconsistent with the foregoing provisions relating to the Commerce Court, are repealed."

The provisions of the last-named act relating to direct appeal were modified by the Act of February 13, 1925 \textsuperscript{29} entitled "An Act to amend the Judicial Code, and to further define the juris-

\textsuperscript{25} 34 STAT. 590 (1906), 49 U. S. C. § 16 (1934).
\textsuperscript{26} 36 STAT. 1087 (1911), 28 U. S. C. § 1 (1934).
\textsuperscript{27} Confer, Judicial Code and Judiciary, 28 U. S. C. A. § 41 c. 2, historical note; 4 INTERSTATE COMMERCE ACTS ANNOTATED (Aitchison 1930) at 3113.
\textsuperscript{28} 38 STAT. 219 (1913); see historical note 28 U. S. C. A. § 48 (Supp. 1936).
\textsuperscript{29} 43 STAT. 938 (1925), 28 U. S. C. § 345 (1934).
diction of the circuit court of Appeals and of the Supreme Court, and for other purposes." This act did not in terms amend certain provisions of the Judicial Code, but limited the direct appeal from the district courts to the Supreme Court provided by the latter act to so much of that act as relates to review in suits to enforce, suspend, or set aside orders of the Commission other than for payment of money.

While no attempt will be made here to include all of the many provisions of the Judicial Code applicable to or having a bearing upon proceedings in court in every case which might arise under the various acts which vest authority in the Interstate Commerce Commission, it will prove helpful to include sections in terms relating to proceedings in court in respect of enforcement or suspension of the Interstate Commerce Commission orders, or to proceedings instituted by or at the instance of the Commission and necessarily related sections. The following are the provisions from the United States Code in point here: 30

Sec. 41. The district courts shall have original jurisdiction as follows:

Eighth. Of all suits and proceedings arising under any law regulating commerce.

Twenty-Seventh. Of all cases for the enforcement of any order of the Interstate Commerce Commission.

Twenty-Eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Venue is set forth in Section 43 of the United States Code. Procedure in the District Courts is set forth in Section 44. Section 45 outlines jurisdictional and procedural details. Section 45 (a) provides for proper persons to conduct the appeal in the Supreme Court.

Suits to enjoin, set aside, annual, or suspend any order of the Interstate Commerce Commission shall, according to Section 46 be brought in the District Court.

Section 47 refers to granting of an interlocutory injunction and the procedure to be followed in all such cases.

Section 47 (a) provides for review by the Supreme Court.

All cases herein specified shall be brought by or against the United States, according to Section 48.

The original Interstate Commerce Act of February 4, 1887, 31 provided for appeal to the Supreme Court from decisions of the


then-existing circuit courts in proceedings arising out of a violation or disobedience of any lawful order or requirement of the Commission. But under the provisions of the Act of March 3, 1891,\footnote{26 Stat. 828 (1891), 28 U. S. C. 225 (1934).} which created circuit courts of appeal and defined the jurisdiction of those courts and of the Supreme Court, direct review by the latter of decisions of the circuit courts did not include proceedings under the foregoing provisions of the Interstate Commerce Act, and thereafter appeals in such proceedings generally lay first to the circuit courts of appeal. Subsequently, under the terms of Section 2 of the Expediting Act of February 11, 1903,\footnote{32 Stat. 590 (1906), 49 U. S. C. \(16\) (1934).} provided for direct appeal from the circuit courts to the Supreme Court in suits in equity under the interstate commerce and antitrust laws wherein the United States is complainant. Section 3 of the Elkins Act of February 19, 1903,\footnote{32 Stat. 539 (1910), 28 U. S. C. 41 (1934).} extended the Expediting Act to any case prosecuted under the direction of the Attorney General in the name of the Commission. The Hepburn Act of June 29, 1906,\footnote{34 Stat. 828 (1910), 28 U. S. C. \(16\) (1934).} by amendment of Section 16 of the Interstate Commerce Act, further extended the Expediting Act to suits to enjoin, set aside, annul or suspend any order or requirement of the Commission and to any proceeding in equity to enforce any such order or requirement or any provision of the Interstate Commerce Act and also in terms provided for direct appeal. The provisions of the Hepburn Act were superseded by the Commerce Court or Mann-Elkins Act of June 18, 1910,\footnote{35 Stat. 590 (1906), 49 U. S. C. \(16\) (1934).} which created the Commerce Court, vested in it in certain classes of cases the jurisdiction formerly in the circuit courts, and provided for direct appeal to the Supreme Court. The Commerce Court was abolished by the Urgent Deficiencies Appropriation

\footnote{26 Stat. 828 (1891), 28 U. S. C. 225 (1934).} Pertinent sections of this act:

Section 225.

(a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions:
1. In the district court.

(b) The circuit courts of appeal shall also have appellate jurisdiction:
2. To review decisions of the district court.

(e) The circuit courts of appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, Interstate Commerce Commission, and the Federal Reserve Board.

\footnote{32 Stat. 828 (1903), 49 U. S. C. \(45\) (1934).}
\footnote{32 Stat. 847 (1903), 49 U. S. C. \(41-43\) (1934).}
\footnote{34 Stat. 590 (1906), 49 U. S. C. \(16\) (1934).}
\footnote{36 Stat. 539 (1910), 28 U. S. C. \(41\) (1934).}
Act of October 22, 1913. Further change in respect of direct appeal from the district courts to the Supreme Court was made by the Act of February 13, 1925.

Before discussing any of the cases that have interpreted the various sections of the Interstate Commerce Act on appeal to the Courts, we include here references to other sections of the Communications Act of 1934 having to do with the relations between the Courts and the Commissions. Particularly pertinent are the sections of the former relating to the jurisdiction to enforce acts and orders of the Commission, mandamus to compel furnishing of facilities and petitions for enforcement of orders for the payment of money. These sections are given in substance here:

Section 401:

(a) The district courts of the United States shall have jurisdiction to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order.

(c) Upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court all necessary proceedings for the enforcement of the provisions of this Act, costs and expenses to be paid by the courts of the United States.

(d) The provisions of the Expediting Act, approved February 11, 1903, shall be held to apply to any suit in equity arising under Title II of this Act, wherein the United States is complainant.

The provisions of the Expediting Act of February 11, 1903, grew out of the desirability of expediting such litigation because of its far-reaching importance and general public interest.

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39 The other appeal provisions affecting appeals in certain kinds of cases are found in Sections 345-348 of the Judicial Code.
41 42 STAT. 624 (1922), 49 U. S. C. § 19 a (f) (1934).
44 Language is new although based on other similar provisions.
47 By the Judicial Code, Section 291, the power and duty imposed upon circuit courts shall be held to refer to and confer such power upon the
The district courts of the United States are given jurisdiction, in Section 406 of the Communications Act, in any action to compel by mandamus, the furnishing of facilities in interstate or foreign communications by wire or radio, or in interstate or foreign transmission of energy by radio. The same courts are given jurisdiction, by Section 407 of the Communications Act, of petitions for enforcement of an order for the payment of money. Section 414 of the Communications Act provides that “nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.”

“It was the experience of the Interstate Commerce Commission from its establishment in 1887 down to the extension of its powers by the Hepburn Act of 1906 which served especially to emphasize the inconveniences of extended court control over the orders of an administrative body. The Commission’s orders were not self-executing but could only be enforced in a proceeding brought by the Commission in a circuit court and the Commission’s findings had only the effect of prima facie evidence. The courts refused to accept the evidence taken before the Commission in the original proceedings as final. They treated the proceeding before it as an original proceeding even as to questions of fact and proceeded to consider it de novo.”

Although these things were subsequently corrected, ample opportunity for court review has been preserved in the statute. The question of how far the review shall reach has been left largely with the Supreme Court, and is being traced out by decisions in a zigzag line which sometimes seems to defy plotting. Occasionally the court has thought fit to formulate principles which it says will be followed in exercising its reviewing power. Thus, in Interstate Commerce Commission v. Illinois Central R. R., it was said:

“In determining whether an order of the Commission shall be suspended or set aside, the Supreme Court must consider:

(a) all relevant questions of constitutional power or right;

(b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made;

district courts; and by Section 289, the circuit courts were abolished. Therefore, wherever “circuit court” appears “district court” should be substituted. 36 Stat. 1167 (1910), 28 U. S. C. §§ 430, 430 (a) (1934).


50 215 U. S. 452 (1910).
“(c) whether, even although the order be in form within the delegated power, nevertheless it must be treated as embraced therein because its authority has been manifested in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power; but

“(d) the Supreme Court may not, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful order upon its conception as to whether the administrative discretion has been wisely exercised.”

These principles are further elaborated in Interstate Commerce Commission v. Union Pacific R. R.,51 where the court held that in all cases thus far decided it has been settled that orders of the Commission are final unless same are beyond the power which it could constitutionally exercise; beyond its statutory power; or based upon mistake of law. Where questions of fact are involved in the determination of question of law, a regular order may be set aside if it appears that the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without supporting evidence or then again if the authority involved has been exercised in such an unreasonable manner as to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. These principles open a wide door to court review, yet the court has not defined “questions of fact” and it remains in the discretion of the court alone to decide what “ought to have been included”.

The conclusion is well taken that any broader power of review in the courts than the power to reverse for error of law on the ground of there being no evidence to support the finding, would be unconstitutional as vesting the court with legislative or administrative power. Thus in the case of Public Utilities Commission v. Potomac Electric Power Co.,52 a federal statute gave an appeal to the United States Supreme Court from orders of the Public Utilities Commission of the District of Columbia, and provided that appeal proceedings should conform to the equity procedure. The Court refused to exercise this privilege saying that such legislative or administrative jurisdiction cannot be conferred on a court, either directly or by appeal. In referring to its review power in connection with orders of the Interstate

51 222 U. S. 541 (1912).
52 261 U. S. 428 (1923).
Commerce Commission the court said that any finding of fact by the Commission is final and conclusive on the courts.

The distinction between "questions of law" and "matters of fact" means that some matters are left, by the policy of the courts, to the sound discretion of the administrative agency. The Court said in the case of Virginia Ry. v. United States, "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases is beyond our province." There is a positive deference toward the administrative judgment in these doctrines of judicial review.

The Court will not itself originate regulation in those matters which Congress has placed within the jurisdiction of the Commission. This has given rise to the doctrine of primary jurisdiction. Under this theory, whenever discretion is to be exercised, the question is one for the Commission to decide in the first instance. But if there is an inquiry as to the Commission's authority to determine a question, the courts will determine the matter. Usually they adhere to the theory that carriers must first exhaust the administrative remedy. Then, too, the courts will refuse to act in some instances where the administrative agency has refused to act, which is known as the doctrine of affirmative and negative orders. The basis of this denial of judicial authority lies in the difficulty of forcing the exercise of administrative discretion and the further consideration that such interference would amount to judicial exercise of the administrative function. Judicial review of negative orders has been denied, then, with consistency, but recently the Court has declared the doctrine that they will extend judicial review in those cases where the orders of the Commission are negative in form but affirmative in substance.

Since the Communications Act incorporates by reference these provisions for judicial review from the Interstate Commerce Act, the great body of law built up around that act also applies to the

54 272 U. S. 658 (1926).
56 See 283 U. S. 235 (1931); 289 U. S. 385 (1933).
57 See 234 U. S. 1 (1913); 265 U. S. 533 (1924); 287 U. S. 229 (1932).
new legislation. The case law is applicable in every way, then, to any questions which might arise under the Communications Act.

There have been no cases of interest, under the Communications Act, since the Commission was organized on July 11, 1934, relating to appeal of "radio cases" but there has been one case under Section 402 (a) in which a court appeal was taken the same as if it were an order of the Interstate Commerce Commission before the court. This was the case of American Telephone and Telegraph Co., et al., v. United States of America and Federal Communications Commission, recently decided.

The case was heard before Martin T. Manton and Augustus N. Hand, circuit judges, and John C. Knox, district judge, constituting the statutory court. In its brief, the plaintiff company, after setting forth the statutory authority, as outlined here, for bringing the action said:

"A preliminary statement with respect to the scope of review in cases of this character should perhaps be made. It will, we believe, be sufficient to refer to two decisions of the Supreme Court from among the very large number of cases which are apposite. In Proctor & Gamble v. United States, the court says that in considering orders of the Commission for the purpose of enforcing or restraining their enforcement, the courts are confined to determining . . . whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. [Citing Interstate Commerce Commission v. Illinois] Plaintiffs challenge the order here on all three grounds; i.e., they maintain that it violates their constitutional rights, that it is beyond the Commission's statutory authority, and that it is so unreasonable and arbitrary as to exceed, in substance as distinguished from form, the Commission's delegated power."

The case involved the accounting system for interstate telephone companies having annual operating revenues in excess of $50,000 per year, promulgated by the Commission June 19, 1935. The order was held to be constitutional and, except in connection with the allowance for depreciation of plant and equipment held for future use and the recording of the contribution of properties, the permanent injunction asked for was denied.

The court in passing upon the jurisdictional features, said in reviewing this order it would be guided by the rule that in respect

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60 225 U. S. 282 (1912).
61 Federal Communications Commission, (Telephone Division) Order No. 7-C.
to orders of the Commission, the court could not, under the pretence of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon its conception as to whether the administrative power has been wisely exercised. This rule guides judicial review of any legislative act. Thus the court, in this, the first case of its kind under the Communications Act of 1934, followed the well-defined principles declared under many similar interpretations of the Interstate Commerce Act.

The whole question of appeal from administrative tribunals urgently calls for consideration and opens alluring vistas for further exploration, which are not, however, properly the subject of our investigation here. The right of appeal is vital to the litigant, and the mere existence of it is a powerful stimulus to efficiency and care in the tribunal of first instance. It is said that if decisions of administrative bodies are final and without appeal, great injustice will result. But, it has been persuasively argued, the decisions of courts in matters within their jurisdiction are also final and that there must be a final tribunal somewhere for deciding every question in the world; the idea is presented that injustice may take place in all tribunals and that all human institutions are imperfect—courts as well as commissions and legislatures. The demand for judicial review is put upon the basis that administrators are, by the nature of their tasks, not fitted for the development of a body of law, and that judicial review provides the "growing point" in the law.

Finally, there are the suggestions for an autonomous administrative system, with one administrative tribunal controlled by another, thus admitting the necessity of some reviewing agency, but remaining away from the strictly judicial type of review. The advocates of this plan proceed upon the theory that courts are not equipped to review findings of fact in many technical fields. On the other side, there is the improperly equipped administrative body, ignorant of fundamental legal principles, doing injustice with its findings and orders to the conceptions of justice which obtain among Anglo-American peoples; judicial review should be permitted in such cases, they say. Definite proposals for a United States Administrative Court have already been

62 Allen, Bureaucracy Triumphant (1931).
64 Dickinson, Administrative Justice and Supremacy of Law (1927) 203.
made. Specialized appellate tribunals in the Federal Government have not been unknown, for we had the Commerce Court. But we read:

"The need for a coherent system of administrative law, for uniformity and dispatch in adjudication, for the subtle skill required in judges called upon to synthesize the public and private claims peculiarly involved in administrative litigation, these and kindred considerations will have to be balanced against the traditional hold of a single system of courts, giving a generalized professional aptitude to its judges and bringing to the review of administrative conduct a technique and temperament trained in litigations between private individuals."

We venture no further into this controversial field, however, leaving the ultimate solution of these perplexing problems to the immediate or distant future, which somehow always provides a middleway, or totally new way, in its time and in its day at least momentarily meeting the exigencies of situations as they arise. We content ourselves to withdraw from enlarging the scope of our investigations here, confining our research to the two systems of judicial control under the Communications Act of 1934.

THE SUPREME COURT OF THE UNITED STATES*

Many important decisions have been rendered recently by the Supreme Court in all fields of the law, but none has commanded such widespread attention and aroused public interest to such an extent as those dealing specifically with recent social legislation, both state and federal. Indeed it is not too much to say that at no time in our history has there been such an awakened public realization of the basic principles, notably separation of powers, upon which our nation was founded.

* Written April 15, 1937.
and has grown and prospered. There has also been an awakened legislative interest which must inevitably result in more accurate and painstaking drafting of new laws which will have their basis rather in the commerce clause of the Constitution \(^1\) than in the more popular but often chimerical general welfare clause.\(^{1a}\)

**National Labor Relations Act**

On April 12th, 1937, the Supreme Court rendered its decision upon the question of the power of Congress to determine whether unfair labor practices, indulged in by certain business organizations, so burdened and obstructed the free flow of interstate commerce, even though the employees work in manufacturing or production plants and are not themselves engaged in interstate commerce, as to come within the regulatory power and proper jurisdiction of the National Legislature under the commerce clause of the Constitution.

The National Labor Relations Act \(^2\) was sustained by the Court in five cases. In one, involving the character of the Associated Press,\(^3\) the decision was unanimous on the position that it was engaged in interstate commerce and was therefore subject to the provisions of the Act. Three justices joined with Mr. Justice Sutherland, however, in a separate opinion, in which it was asserted that the power of Congress to regulate interstate commerce did not give it the power to interfere with the freedom of the press, a right guaranteed by the First Amendment. The dissenting justices insisted that the Act, in its application in this case, did in fact encroach upon the freedom of the press. An unanimous opinion was rendered in the case involving the Washington, Virginia & Maryland Coach Company,\(^4\) an interstate carrier, sustaining the applicability of the statute to employees engaged in its various activities.

In the most outstanding and important cases, which involved purely production enterprises,\(^5\) the Court was divided, five to

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\(^1\) U. S. Const., Art. I, Sec. 8, cl. 3.

\(^{1a}\) Id., cl. 1.


four, as to whether the National Labor Relations Act was constitutional as applied to the particular circumstances. Though five separate decisions involving the National Labor Relations Act were handed down, including the two mentioned above, a discussion of the principles and reasoning supporting them was mainly limited to the opinion delivered by Mr. Chief Justice Hughes in the Jones & Laughlin Steel Corporation case, the scope and effect of which is undergoing wide discussion. It is believed by many individuals, some high in the Government service, as well as by a few lawyers, and certainly by the average layman—and the view may be substantiated by the statements of Mr. Justice McReynolds in his strong dissenting opinion to the decision in the production cases—that the previous interpretations of the Court on the power of Congress to regulate business not actively engaged in interstate commerce have been materially altered by these decisions. A closer examination and careful analysis, however, it is believed, will disclose that the well-understood principles relating to the power of the central Government over private industry and its relation to interstate commerce is affected only slightly. The scope of the term "interstate commerce", as it has previously been understood and interpreted remains the same. The decisions must be limited to the admittedly serious effect of labor disputes and disorders on the "free flow of interstate commerce". Nowhere in any of the majority decisions can it be found or even inferentially stated that there is now invested in Congress, as a result thereof, the power to regulate and control the internal affairs of a business of a purely intrastate character where there can be found no serious restriction or burden on the free flow of commerce between the states. On the contrary, it was emphatically stated that the "authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce among the several states and the internal concerns of the states. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system." It was further declared, in discussing the statute in question and the definition of "commerce" and activities "affecting commerce" therein contained, that the grant of authority to the National Labor Relations Board does not purport to extend to the relationship between all industrial employees and employers. "Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus quali-
fied, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes." 6 It is the effect upon commerce, not the source of the injury, which is the criterion. 7 "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the [National Labor Relations] Board, is left by the statute to be determined as individual cases arise."

As a result of these decisions, therefore, it must be considered that only when labor strife, wherever it may be, would have a substantial effect on the free flow of interstate or foreign commerce, does there exist the power in the Federal Government to provide, and through the National Labor Relations Board to require, that both sides submit to the now recognized peaceable method of collective bargaining for the settlement of such disputes. It is further clear that employers may not lawfully discriminate against their employees because of union or nonunion affiliations where a dispute begun by either party will produce the undesirable result of burdening interstate commerce, so essential to the prosperity and growth of the United States.

It was clearly pointed out that the fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement, 8 and to adopt measures to promote its growth and insure its safety. 9 And, although "activities may be intrastate in character when separately considered ", the Chief Justice said, "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control ". In support of this statement numerous cases were mentioned in which the Court has previously applied and reiterated the principle enunciated. 10

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7 See Second Employers’ Liability Cases, 223 U. S. 1 (1911).

8 See The Daniel Ball, 10 Wall. 557 (1871).


10 See Stafford v. Wallace, 258 U. S. 495 (1922); Chicago Board of Trade v. Olsen, 262 U. S. 1 (1923); Wisconsin Railroad Commission v. Chicago,
In pointing out the difference between cases like those under consideration and the *Schechter* and *Carter* cases,\(^{11}\) it was said that undoubtedly "the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

It was further held by the Court in these cases that the procedural provisions of the Act do not offend against the constitutional requirements governing the creation and action of administrative bodies. The Act establishes standards to which the Board must conform; it sets out provisions for complaint, notice and hearing. The Board is required to receive evidence and make findings which are conclusive only if supported by evidence. An order of the Board is subject to judicial review and may be enforced only when sustained by the court. On review by the court, questions of the Board's jurisdiction and the regularity of its proceedings are open to examination by the court.

The order of the Board, in so far as it entitles employees to back pay and reinstatement, was held not to contravene the Seventh Amendment by denying the employer a jury trial. That Amendment preserves the right to a trial by jury which existed under the common law when it was adopted. It has no application to cases where recovery of money damages is an incident to equitable relief, even though damages might have been recovered in an action at law. It does not apply where the proceeding is not in the nature of a suit at common law.\(^{12}\) "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding."

In the dissenting opinion of Mr. Justice McReynolds, in which is set forth in full the opinions of the Circuit Courts of Appeals in the three manufacturing cases holding the National Labor

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Relations Act inapplicable to the industries involved, it was asserted that the majority of the Court departed from the well-established principles followed in the Schechter and Carter cases, and that the power of Congress under the commerce clause does not extend to the regulation of the relations between employers and employees engaged in local production. The majority holding, said the dissent, "goes beyond the constitutional limitations heretofore enforced. . . . There is no ground on which reasonably to hold that refusal by a manufacturer, whose raw materials come from states other than that of his factory and whose products are regularly carried to other states, to bargain collectively with employees in his manufacturing plant, directly affects interstate commerce. In such business, there is not one but two distinct movements or streams in interstate transportation. The first brings in raw material and there ends. Then follows manufacture, a separate and local activity. Upon completion of this, and not before, the second distinct movement or stream in interstate commerce begins and the products go to other states. Such is the common course for small as well as large industries. It is unreasonable and unprecedented to say the commerce clause confers upon Congress power to govern relations between employers and employees in these local activities. . . . That Congress has power by appropriate means, not prohibited by the Constitution, to prevent direct and material interference with the conduct of interstate commerce is a settled doctrine. But the interference struck at must be direct and material, not some mere possibility contingent on wholly uncertain events; and there must be no impairment of rights guaranteed."

Railway Labor Act

Though not receiving as much attention as the decisions sustaining the National Labor Relations Act, the unanimous opinion of the Court, delivered by Mr. Justice Stone, upholding, in Virginian Railway Co. v. System Federation No. 40,13 the constitutionality of the Railway Labor Act 14 in its application to so-called back-shop mechanical workers employed by an interstate carrier, is by no means unimportant. Although it was maintained by the petitioner that the activities of its "back-shop" employees bore no direct relation to interstate commerce, it was held that the relation was not of slight significance but substantial, and that the nature of the repair work done by them and its relation to interstate commerce.

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commerce afforded an adequate basis for the exercise of the regulatory power of Congress. While the Railway Labor Act, like the National Labor Relations Act, does not require the company to enter into any contract or agreement with the representatives selected by the majority of any craft or class of employees, and certified as such by the National Mediation Board, the company is prohibited by the terms of the Act from the negotiation of labor contracts generally with any others than the authorized representatives of the majority. The cases of Adair v. United States and Coppage v. Kansas were distinguished in that the provisions involved in the Railway Labor Act neither compel the employer to enter into any agreement nor prevent him from entering into any contract with individual employees. The means adopted by the Act were held to be reasonably calculated to prevent the interruption of interstate commerce by strikes and attendant disorders, and not in violation of the due process clause of the Fifth Amendment. In this regard, Mr. Justice Stone said: "The Fifth Amendment . . . is not a guarantee of untrammeled freedom of action and of contract. In the exercise of its power to regulate Commerce, Congress can subject both to restraints not shown to be unreasonable."

State Police Power—Minimum Wage Law for Women

Another important decision of the Court, from the standpoint of public interest, as well as from the viewpoint of the lawyer, was that rendered in West Coast Hotel Co. v. Parrish. The case stands out as a milestone in the field of constitutional law; and, in view of the present heated controversy over the future of the Supreme Court, to appreciate the full effect and meaning of the language used, the majority opinion, delivered by Mr. Chief Justice Hughes, as well as the opinion of Mr. Justice Sutherland, speaking for himself and three of his associates, will bear rereading many times. Not only did the Court specifically overrule the case of Adkins v. Children's Hospital, which had held invalid as an arbitrary interference with the freedom of contract a District of Columbia minimum wage law for women, but the interpretation to be placed on the due process clause of the Fourteenth Amendment to the Federal Constitution was narrowed considerably.

15 208 U. S. 161 (1908).
16 236 U. S. 1 (1914).
17 No. 293, Oct. Term, 1936, decided March 29, 1937.
18 261 U. S. 525 (1923).
19 40 Stat. 960 (1918).
The Court had before it for consideration a statute of the State of Washington,20 identical in substance to the statute in the Adkins case. The Chief Justice declared, however, that the decision in the Adkins case was a departure from the true application of the principles governing the regulation of the relations of the employer and the employed. After asserting that the Constitution does not speak of the freedom of contract, the Court pointed out that it does mention liberty and enjoins deprivation of liberty without due process of law. "In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process." It was added that the essential limitation of liberty in general governs freedom of contract in particular, but there is no absolute freedom to do as one wills or to contract as one chooses. "The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

A few of the many previous decisions of the Court holding that there exists the power under the Constitution to restrict freedom of contract were mentioned in the opinion, among them a case in which the validity of a statute limiting the hours of employment in underground mines and smelters was upheld,21 another sustaining a New York statute which restricted the employment of women in restaurants at night,22 and others, such as the regulation of hours of work of women employed in factories,23 in hotels,24 in hospitals,25 and similar situations in which were

24 Miller v. Wilson, 236 U. S. 373 (1915).
involved restrictions on the free exercise of the liberty of contract.26

With specific reference to the Washington statute, it was said that the "legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deepseated conviction both as to the presence of the evil and as to the means adopted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

It was further pointed out by the Court that the decision in the case of Morehead v. Tipaldo 27 was limited to the question of the distinguishability between the New York and District of Columbia Minimum Wage Laws, and that a review of the principles of the Adkins case had not been sought and consequently was not considered.

The effect of this decision upon other social legislation of the states in the furtherance of their "police power" providing for additional restrictions upon the "liberty of contract", and in particular that relating to minimum wages and hours for men in industry and commerce generally, cannot be accurately forecast; but it is safe to say that in view of the controlling effect of the decision in this case, with respect to state legislation seeking to correct the evils palpably apparent and evidenced by the growing friction and present strife between capital and labor, that due


consideration will be given by the Court to the inequality existing between employees and employers in general.

In the dissenting opinion of Mr. Justice Sutherland, who wrote the majority opinion in the Adkins case, before considering the merits of the case and the basis for the dissent, which was ably reasoned, a defense of minority viewpoints was presented, a portion of which is as follows: "Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction; and so long as the power remains there, its exercise cannot be avoided without betrayal of the trust. . . . Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him. . . . The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. . . . The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs to the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint. This court acts as a unit. It cannot act in any other way; and the majority (whether a bare majority or a majority of all but one of its members), therefore, establishes the controlling rule as the decision of the court, binding, so long as it remains unchanged, equally upon those who disagree and upon those who subscribe to it. Otherwise, orderly administration of justice would cease. But it is the right of those in the minority to disagree, and sometimes, in matters of grave importance, their imperative duty to voice their disagreement at such length as the occasion demands—always,
of course, in terms which, however forceful, do not offend the proprieties or impugn the good faith of those who think otherwise."

Bankruptcy—Frazier-Lemke Act

In another important decision rendered by the Supreme Court, the constitutionality of the revised Frazier-Lemke Act was upheld in *Wright v. Mountain Trust Bank.* Mr. Justice Brandeis, speaking for the Court, declared that the Act did not violate the due process clause of the Fifth Amendment as to a mortgagee of farm land in Virginia. It was pointed out that the decision in the case of *Louisville Joint Stock Land Bank v. Radford,* which held the first Frazier-Lemke Act unconstitutional, was based upon the fact that five substantive rights in property had been taken from the creditor the effect of all of which was to deprive him of his property without due process. The Act as revised preserved three of the five rights. Mr. Justice Brandeis further pointed out that an absolute right to the three-year stay provided for by the Act is not granted to the mortgagor, but it may be terminated by the court having jurisdiction and the sale ordered earlier. The mortgagor's possession is at all times subject to the supervision and control of the court. While the language of the Act is somewhat ambiguous, its provisions were construed by reference to the legislative history of the bill, and the conclusion was reached that the legislation is within the power of Congress to establish uniform laws on the subject of bankruptcy, and that it does not effect an unreasonable impairment of the mortgagee's rights.

Federal Monetary Policy—Gold Clause Contracts

The Gold-Clause Abrogation Resolution of 1933 was again upheld by the Supreme Court, this time in the case of *Holyoke Water Power Co. v. American Writing Paper Co.* The case involved a provision in a water power lease calling for the payment of a "quantity of gold" equal in amount to gold coin of the United States of the standard of weight and fineness of the year 1894 or its equivalent in United States currency as the annual rental. Contrary to the claim of the lessor, it was held that the obliga-

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30 48 STAT. 112 (1933).
31 No. 180, Oct. Term, 1936, decided March 1, 1937.
tion was one for the payment of money and not for the delivery of gold as upon the sale of a commodity. As such, the contract is within the meaning of the joint resolution. The decision in this case was marked by the same division as in the case which originally tested the validity of the resolution as applied to contracts providing for payment in gold coin.\textsuperscript{32}

"The contract involved in the instant case succumbed to the congenital infirmity of dealing with a subject matter which lies within the control of Congress, over which the Congress has exercised its control", and in so finding, Mr. Justice Cardozo, speaking for the majority, pointed out that if the currency to be paid by the lessee is to be the equivalent of gold and if the gold is to be the equivalent of a stated number of gold dollars of a particular weight and fineness, then the covenant to pay the currency is tantamount to a covenant to pay the dollars, and dollars of the stated standard. Such was the obligation of the lessee, and it is the very obligation that has been outlawed as a menace to the maintenance of our monetary system.

Federal Income Tax—Compensation of City Employees

A decision which it is expected will appreciably affect a considerable portion of pending tax litigation was announced by the Supreme Court at a time when many individuals throughout the country were still working over their income tax returns in order to have them filed before the deadline. The case was that of \textit{Brush v. Commissioner of Internal Revenue}\textsuperscript{33} and involved the question as to whether the salary received from the City of New York while employed as chief engineer of the municipal water supply bureau was subject to the Federal tax upon incomes.

In the majority opinion, delivered by Mr. Justice Sutherland, it was declared that the water system was one of the necessary governmental functions of a subdivision of the state, and that its operations, and the fixed salaries and compensation paid to its officers and employees in their capacity as such, are immune from Federal taxation. Since a Federal tax on the activities of a state, or a state agency, is an imposition by one government upon the activities of another, it must accord with the implied Federal requirement that state and local governmental functions be not burdened thereby. "So long as our present dual form of government endures, the states, it must never be forgotten, are as independent of the general government as that government within

\textsuperscript{32} Norman \textit{v.} Baltimore & Ohio Railroad Co., 294 U. S. 240 (1935).

\textsuperscript{33} No. 451, Oct. Term, 1936, decided March 15, 1937.
its sphere is independent of the states.'" 34 The unimpaired existence of both governments is equally essential; neither may tax the governmental means and instrumentalities of the other or the salaries of the employees engaged therein.

In a dissenting opinion, with which Mr. Justice Brandeis joined, it was said by Mr. Justice Roberts that "the imposition of a tax upon such gain where, as here, the tax falls equally upon all employed in like occupation, and where the supposed burden of the tax upon state government is indirect, remote and imponderable, is not inconsistent with the principle of immunity inherent in the constitutional relation of state and nation."

Interstate Commerce—State Caravan Act

In Ingels v. Morf,35 it was held that in order to justify an exaction by a state of a money payment which burdens interstate commerce, such exaction must affirmatively appear to be a necessary reimbursement for the expense of providing facilities or of enforcing regulations of the commerce which are within the constitutional power of the state. The statute under observation was the so-called Caravan Act of California,36 which required that a license fee be paid for each vehicle brought into the state for purposes of sale, and explicitly declared that the fees were to reimburse the state treasury for the added expense of administering the provisions of the statute and policing the caravanning traffic. There was the further provision that the fees collected should be paid into the general fund of the state treasury, in contrast with other statutes of the state relating to motor vehicles, providing that fees be paid, at least in part, into special funds devoted to highway purposes. The Court sustained the lower court in holding that the statute was unconstitutional in that the demanded fee for each car moving in interstate commerce was excessive and did not bear a reasonable relation to the increased cost of policing the traffic.

State Taxation—Use of Personal Property

The validity of the so-called compensating tax imposed by the State of Washington 37 on the privilege of using chattels after they had come to rest within the state was sustained by the Court

34 Collector v. Day, 11 Wall. 113 (1870).
35 No. 456, Oct. Term, 1936, decided March 1, 1937.
37 WASH. REV. STAT. ANN. (Remington, 1936 Supp.) §§ 8370-31 to 8370-35.
in *Heneford v. Silas Mason Co.*\(^{38}\) An exemption was provided for in the statute of property upon which had been paid a sales tax under the law of Washington or of any other state where the property was purchased. It was declared that the tax, although imposed on the use of property purchased in another state in which the sale of the property was not subject to a sales tax, is not a tax upon the operations of interstate commerce, but is a tax upon the privilege of use after the commerce is at an end. The property is no longer in interstate commerce at the time of its use in the state to which it has been shipped, and the privilege of such use is therefore taxable by such state.

**Federal Taxation—Dealers in Firearms**

In an unanimous decision, the opinion delivered by Mr. Justice Stone, it was held in *Sonzinsky v. United States*\(^ {39}\) that a special excise tax on all dealers, importers and manufacturers of firearms is a proper exercise of the taxing power of Congress. It was contended that the National Firearms Act\(^ {40}\) was not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, and thus a regulation of a subject not granted to the Federal Government by the Constitution. It was declared, however, that since on its face the statute is a taxing measure, the Court will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. "In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others. . . . Its power extends to the imposition of excise taxes upon the doing of business."\(^ {41}\) . . . Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect." It has long been established that when an act of Congress *on its face* purports to be an exercise of the taxing power, it does not become invalid because the tax is burdensome or tends to restrict or suppress the thing taxed.\(^ {42}\)

\(^{38}\) No. 418, Oct. Term, 1936, decided March 29, 1937.

\(^{39}\) No. 614, Oct. Term, 1936, decided March 29, 1937.


\(^{41}\) See License Tax Cases, 5 Wall. 462 (1866); Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397 (1904); United States v. Doremus, 249 U. S. 86 (1919).

\(^{42}\) See Veazie Bank v. Fenno, 8 Wall. 533 (1869); McCray v. United States, 195 U. S. 27 (1904).
Constitutional Law—State Regulation of Milk Prices

The Supreme Court held that the Virginia Milk and Cream Act of 1934 \(^{43}\) was not unconstitutional as a burden on interstate commerce, as contended by the operator of a creamery in the District of Columbia and a retailer of milk in Virginia, who had sought to enjoin its enforcement in the case of Highland Farms Dairy, Inc. v. Agnew.\(^ {44}\) The statute established a Milk Commission with power, during an economic emergency, to create natural market areas within the state, and to fix the minimum and maximum prices to be charged for milk and cream therein, and authorized the Commission to exact a license from distributors subject to the act, and provided that in the absence of such a license sales shall be unlawful within the market areas. It was declared in the majority opinion, written by Mr. Justice Cardozo, that the operator of the creamery in the District of Columbia may sell to the retailer in Virginia and the retailer may buy from the operator of the creamery at any price agreed upon by the parties. Not until the milk is resold in Virginia within a market area does the price minimum apply, and then only to the price charged when resold. It was further declared that the statute was not unconstitutional as an unlawful delegation of legislative power in that with reference to each market area the Commission was to determine, after a public hearing, whether there was need within such area for prices to be regulated. As to the contention of invalidity for failing to prescribe the standards to be applied by the Commission in granting or refusing licenses, it was said that the provisions of the statute provide for appeal to the courts from an order refusing a license, or suspending or revoking one, and that therefore one who is required to take out a license will not be heard to complain, in advance of his application, that there is danger of refusal.

Taxation—State Income Tax

The right of the State of New York to levy an income tax upon rents from land outside the state and upon interest on bonds secured by mortgaged real estate also outside the state was upheld by the Court in New York ex rel Cohn v. Graves.\(^ {45}\) The constitutionality of the statute \(^ {46}\) was attacked on the ground that it was in substance and effect a tax on real estate and tangible

\(^{43}\) VA. CODE (Michie, 1936), §§ 1211y to 1211cc.

\(^{44}\) No. 573, Oct. Term, 1936, decided March 29, 1937.

\(^{45}\) No. 404, Oct. Term, 1936, decided March 1, 1937.

\(^{46}\) TAX LAW OF NEW YORK, § 359.
property located outside the state in violation of the Fourteenth Amendment of the Constitution. Mr. Justice Stone, speaking for a divided Court, said that it would be pressing the due process clause too far to say that because a state is prohibited from taxing land which it neither protects nor controls it should likewise be prohibited from taxing the receipt and command of income from the land by a resident who is subject to its control and enjoys the benefits of its laws. A distinction was suggested between the instant case and Pollock v. Farmers Loan & Trust Co.,\(^47\) in that the latter involved the question as to whether a Federal tax on income derived from rents of land is a direct tax requiring apportionment under Article I, Section 2, of the Federal Constitution, and that the decision there rendered was not based upon the ground that the tax was a tax on the land, as such, but only that for purposes of apportionment there were similarities in the operation of the two kinds of tax which made it appropriate to classify both as direct and within the constitutional command. "Neither the privilege nor the burden is affected by the character of the source from which the income is derived", stated Mr. Justice Stone, for which reason it was held that income is not necessarily clothed with the tax immunity enjoyed by its source.

**Federal Declaratory Judgment Act**

In the first case to be decided by the Supreme Court of the United States involving the Federal Declaratory Judgment Act,\(^48\) it was held to be valid as applied to a controversy between a life insurance company and the insured and his beneficiary. It was decided that the case presented an actual controversy within the meaning of the statute and therefore proper for the court to take jurisdiction under Article III, Section 2, of the Constitution. The case\(^49\) involved a dispute as to whether a policy had lapsed for nonpayment of premiums or had continued in effect under a provision that premiums need not be paid during permanent and total disability. Mr. Chief Justice Hughes, speaking for the Court, declared that the dispute was based upon a definite fact which could be finally determined, calling not for an advisory opinion upon an hypothetical basis, but for an adjudication of a present right upon established facts. Simply because the dispute turned

\(^{47}\) 158 U. S. 601 (1895).
upon questions of fact was held not to have the effect of withdrawing it from judicial cognizance.

The decision rendered in this case may well have added significance in view of recent discussion engendered over the jurisdiction of the Court to deliver advisory opinions and make declaratory judgments.

Perjury—Correction of Testimony

In determining the important question in Federal criminal law as to whether the retraction of false testimony previously given exculpates a witness of perjury, it was held in United States v. Norris that the crime of perjury is complete when under oath a deliberate false statement has once been made. The case arose out of testimony given before a United States Senate subcommittee investigating campaign expenditures of candidates for the Senate. To the argument that to allow retraction of perjured testimony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties, it was said for the Court by Mr. Justice Roberts that it overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing, it will have its intended effect, while if it is discovered, the crime may be purged by resumption of the role of witness and substitution of the truth for previous falsehood. "It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately exacting the truth by cross examination, by extraneous investigation or other collateral means."

Federal Interpleader Act—Supplemental Proceedings in Aid of Decree

In a case arising under the Federal Interpleader Act, it was held by the Court, speaking through Mr. Justice Van Devanter, that the federal district court, which rendered a decree terminating the liability of the surety on the qualifying bond of a workmen's compensation insurer, and fixing the full measure of the claim under the bond of a claimant who had previously recovered a judgment against the surety, had the power to render a supple-

50 No. 600, Oct. Term, 1936, decided March 29, 1937.
51 The defendant in this case was not Senator Norris of Nebraska.
mental decree enjoining such claimant from prosecuting a suit in a state court against the surety on the appeal bond given in his earlier suit. It was said that the later suit was essentially an effort to enforce against the surety on the qualifying bond the judgment which he had obtained against it, and was in contravention of the decree rendered in the interpleader suit. The surety on the qualifying bond had paid into the registry of the court the full amount of the bond and had filed a bill of interpleader, since the claims arising against the secured principal far exceeded the amount of the bond. It was clearly brought out in the opinion that the suit against the surety on the appeal bond was essentially an effort to enforce against the surety on the qualifying bond the judgment which had been obtained against it as such surety. This effort was thus to hold the surety on the qualifying bond to a liability in excess of the amount of its bond, since it would necessarily be required that the surety be reimbursed on the appeal bond.⁵³

*Criminal Law—Jury Trial—Petty Offenses*

In *District of Columbia v. Clawans*,⁵⁴ it was held that the offense of selling in the District of Columbia unused portions of railway excursion tickets, without a license required by a statute as a condition precedent to engaging in such business,⁵⁵ is not within the class of crimes for which a jury trial is required under the Constitution. The crime is "at most but an infringement of local police regulations, and its moral quality is relatively inoffensive". Nor does the fact that it is punishable by a fine of not more than $300 or imprisonment for not more than 90 days entitle the accused to a jury trial as of right under the rule that the severity of the punishment may be considered in determining whether a crime, in other respects trivial, may be deemed so serious as to be comparable with common law crimes to the extent that the accused is entitled to a jury trial by the Sixth Amendment to the Constitution. The judgment of conviction was reversed, however, because of an unreasonable restriction in the trial court on the right of cross-examination of witnesses for the Government.

R. McM.

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⁵⁴ No. 103, Oct. Term, 1936, decided April 5, 1937.

CONTROVERSIAL DISCUSSION AROUSED by the President's message recommending a reorganization of the federal judiciary has converged around one issue only; yet the message contains three other distinct proposals, any of which may be considered more novel than the first. 1

The plan may be divided as follows: (1) appointment of additional judges to any federal court when the incumbent reaches the age of seventy, including the naming of six new justices to the Supreme Court (this portion of the program has almost exclusively absorbed the concern of Congressmen, the remainder of the President's message being almost overlooked); (2) creation of a new office in the Supreme Court called a Proctor, whose duty it will be to watch the calendars of all lower federal courts and whenever one or more is congested with too much litigation to send in an additional judge or more, if this be necessary to expedite the work; (3) provision for the expediting of decisions in cases involving the constitutionality of federal legislation. The constitutionality of a federal law is usually attacked, in the first

1 "There is . . . for instance a tenth Federal circuit for which there once existed, but no longer exists, a corresponding member of the Court. This anomaly is a memento of President Lincoln's well-warranted fear that the court over which Roger Taney presided might upset important war measures. Nor did Lincoln act without precedent, for 25 years earlier the court had been enlarged from seven to nine Justices in order—among other things, perhaps—to water down the remnant of the old Marshall bench." President and the Court—A crucial issue. (From the New York Times Magazine of February 14, 1937) by Edward S. Corwin, McCormick Professor of Jurisprudence, Princeton University. "The size of the Court was largest under Lincoln. But Congress, fearing that Andrew Johnson might get a chance to fill a vacancy on that aging Court, reduced the size of the court from 10 to 7 by providing that no vacancy should be filled until the Court reached 7. Then, as soon as Grant was in office, Congress promptly increased the Court, which in the meantime had been diminished to eight, back to nine, and with the retirement of Judge Grier for infirmity, Grant had two places to fill on the Court. He filled them with judges known to favor the Legal Tender Acts. The constitutionality of those acts was the burning issue of that day. The very day he appointed these two judges, the Supreme Court, by a vote of 5 to 3, held the Legal Tender Acts unconstitutional. But with these two new judges on the Court, the cases were all reargued and opened up, and the opinion holding the Legal Tender Acts unconstitutional, rendered a few months before, was reversed." Radio address by Hon. Sherman Minton, of Indiana, on February 15, 1937; 81 Cong. Rec., February 17, 1937, at 1645.
instance, in a federal district court. Once decided there, it must usually be appealed to the appropriate circuit court of appeals. From there it may finally reach the Supreme Court. The President proposes that appeal from decisions of the lower courts upon constitutional questions shall (a) be taken directly to the Supreme Court, and (b) that there they shall be given precedence over all other cases; (4) legislation making the Government an essential party to every lawsuit involving the constitutionality of any federal law.² This is a repercussion of stockholders' bills,³ wherein the Government could do no more than ask for the privilege of entering as amicus curiae. The granting of this request lay in the discretion of the Court, for, although an entire legislative program might be involved, the Government could not intervene as a matter of right. When granted, the privilege was insufficient because the plaintiff and defendant controlled the building up of the record, and the Government had no appeal since it was not a party litigant. This the President is seeking to correct.

For the purpose of this paper concentration will center upon the latter two of the four proposals.

**Provisions of H. R. 2260**

H. R. 2260⁴ was designed to confer on the United States Government the status of a party litigant in all cases where the constitutionality of any statute of the United States is drawn in question. If the court is of opinion that a substantial ground exists for questioning the constitutionality of the statute, this fact is to be certified to the Attorney General by the court having jurisdiction of the proceeding. Provision is made for submission of evidence and argument to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of the statute. Section (b) serves to create in the United States a right of appeal equivalent to that possessed by the real parties to the litigation.

It is provided by the committee amendment to this bill⁵ that the Attorney General in his discretion may appeal directly to the Supreme Court from any decision or order of a lower court which is adverse to the constitutionality of an act of Congress, and that such appeals shall have precedence over other cases in the Su-

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² Message from the President of the United States Transmitting a Recommendation to Reorganize the Judicial Branch of the Federal Government, February 5, 1937.
⁴ 75th Congress, 1st Session (1937).
⁵ Report No. 212 from the Committee on the Judiciary, February 9, 1937.
premier Court. This right of review by the United States is not made to depend on an active participation in a case by the United States through appearance or argument in a lower court.  

Stockholders' Bill

The soundness of these measures may best be tested by a study of the circumstances which necessitated their proposal and of the purpose which they are intended to achieve. The vice which is sought to be corrected is the paradox of power residing in an individual to attack and in some cases invalidate an act of Congress, the Federal Government bearing the full brunt of the attack without being allowed to raise a single defensive barrier. An individual is more effective in asserting a relatively minute interest in statutes than a sovereign power is in protecting its aggregate interest. These are the elements inhering in the stockholders' bill.

The device of the stockholders' bill unostentatiously made its entrée in the case of Dodge v. Woolsey, and fully revealed its ultimate potentialities in the Public Utility Holding Company case. This is formally a trustee's bill seeking instructions from a court of equity. Intervening stockholders utilize such bills as media through which they may assert three kinds of justiciable rights against the corporation. Most effective as a mask for questioning the constitutionality of an act of Congress has been the derivative or corporate right of action, asserted for the corporation by the minority stockholders, on the grounds of breach of a trust for failure to prosecute certain corporate causes of action either against fraudulent officers or against persons outside the corporation.

These stockholders' bills have been somewhat limited to question the disregard of duty by the directors or trustees, as con-

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5a This bill (H. R. 2260) was passed by the House of Representatives on April 7, 1937.
6 The Prince’s Case, 8 Co. 1, 15 a, 29 a (K. B. 1600).
7 18 How. 331 (U. S. 1855).
8 Burco Inc. v. Whitworth, 81 F. (2d) 721 (C. C. A. 4th 1936), cert. denied, 297 U. S. 724 (1936); supra n. 3.
9 Others are (a) individual rights, resulting from a denial of the power to vote, the refusal to pay a declared dividend, the breach of a contractual obligation, or prospective ultra vires acts of the corporation, (b) a minority right founded on a breach by the management of its fiduciary obligations to the minority. Southern Pacific Co. v. Bogert, 250 U. S. 483 (1919).
trasted with the exercise of discretion by the officers, and have been resorted to for the purpose of contesting the constitutionality of taxes and federal expenditures. Will they be extended to permit stockholders to question the validity of regulatory or proprietary programs? The serious jurisdictional barriers presented by this question have in the past rendered unlikely an affirmative answer, because (the asserted right being a corporate one) the defendant probably would be the victor in any event. On the other hand, if the officers were sued it would not be because of an allegation of their commission of ultra vires acts; rather would it be (as in the T. V. A. case) on the basis that the officers were acting for the Corporation under an invalid act of Congress. In the first instance it would probably be held that there was no justiciable controversy; in the second, that the plaintiff, as a stockholder, had no standing in court. At least it would seem that cases similar to the T. V. A. case are not precedents for securing a decision on the constitutionality of a regulatory statute by means of intra-corporate stockholders’ suits, unless the government is made a party. Therefore, indirectly the proposed change becomes the palladium and aegis of those against whom it is directed, in thus removing a jurisdictional difficulty which will (if the proposed legislation becomes law) embolden stockholders to contest the validity of regulatory acts of Congress.

Ever since the Pollock and Brushaber cases, it has been established that a stockholder may file a bill to restrain a corporation from paying a tax, even, as Mr. Justice Brandeis has signalized in the T. V. A. case, at the price of a rule of equity

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12 If the decision not to sue results in an uncompensated loss to the corporation, the refusal to test the constitutionality of questionable statutes is a breach of trust. Dodge v. Woolsey, 18 How. 331 (U. S. 1855) supra note 7; Pollock v. Farmers’ Loan and Trust Co., 157 U. S. 429 (1895). If, on the other hand, it is reasonably believed that the decision reached did not carry with it substantial losses, but was an honest error, or if it is reasonably believed to be justified on account of maintaining good will, it is chargeable to the exercise of honest judgment and cannot be gainsaid. Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 343 (1936), Brandeis J., concurring.


13 This would really result in a suit by a stockholder against the corporation for a breach of trust, and one by the corporation against the United States for relief from an unconstitutional statute, which would entail the necessity of jurisdiction over both the Government and the corporation, when the plaintiff might not be able to procure service of summons on both. See Note (1936) 45 Yale L. J. 649.


16 Ashwander v. Tennessee Valley Authority, cited supra at note 12.
jurisdiction. The *Pollock* and *Brushaber* cases were brought by a single stockholder in each instance to enjoin an alleged breach of trust consisting in voluntary payment by the corporation of a tax claimed by the stockholder to be illegal. However, the *Guffey Coal Act* and *Public Utility Holding Act* cases countenanced suits between two opposing stockholders, the court in the former case saying: "Without repeating the long averments of the several bills, we are of opinion that the suits were properly brought and were maintainable in a court of equity. The right of stockholders to bring such suits under the circumstances disclosed is settled by the recent decision of this court in *Ashwander et al. v. Tennessee Valley Authority*, 297 U. S. 283, and requires no further discussion." In the latter case the question of the constitutionality of the *Public Utility Holding Act* was held properly presented to the federal district court in a justiciable controversy by a petition of the holding company's trustees for instructions as to whether they should comply with the act in proceedings for reorganization of the company under the Bankruptcy Act. In that case, as in the preceding one, the Government was not a necessary party to the proceedings, and the principle of the *Pollock case* was again applied.

The *T. V. A. case* was brought by holders of preferred stock of the Alabama Power Co. with the challenge that the contract with the *T. V. A.* was an illegal transaction violating the fundamental law. Although it was sought to find a distinction between preferred and common stockholders to justify a denial to the former of a right long since conceded to the latter, the majority of the court discarded the attempt and recognized the right. Mr. Justice Brandeis parted with the majority on the question of jurisdiction to entertain the stockholders' bill. Fully appreciating the weak

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17 Mr. Justice Brandeis was criticizing the fact that there was no finding of irreparable injury before jurisdiction was assumed. 297 U. S. 288, 343 (1936).
18 Cited supra note 14.
19 Cited supra note 15.
20 *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936). In this case there was one suit by several coal companies against a Collector to enjoin collection of the tax imposed by the "Bituminous Coal Conservation Act of 1935", and another brought by stockholders in the same court against the coal company to secure a mandatory injunction against a refusal to operate under the provisions of the Bituminous Coal Code.
23 157 U. S. 429 (1895).
foundation for such a bill, he stated: "Insofar as any of the cases discussed [among them the Pollock and Brushaber cases] may be deemed authority for maintaining this bill they should now be disapproved. The court, while recognizing the soundness of the rule of stare decisis where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous." 24 This followed a careful analysis of the jurisdictional question in conjunction with the purpose of the stockholders' bill, namely, the determination of the constitutionality of an act of Congress, and his conclusion is based largely on the traditional reluctance of the Supreme Court to question the constitutionality of an act of Congress.

In the stockholders' bills, the three possible situations in which the Government might be represented 25 left constantly present the danger of dismissal of a suit because of the absence of an honest and antagonistic assertion of rights. Under H. R. 2260 proper representation by the Government affords an effective cure for this latent weakness, and, in thus obviating the danger, works an additional indirect benefit to the stockholders.

The necessity for H. R. 2260 from the point of view of the Federal Government seems clear beyond question. The present status of the Government in stockholders' suits wherein the constitutionality of a statute is attacked seems untenable in the interest of speedy and efficient justice. This position was most clearly outlined by the lower court in Burco v. Whitworth. 26 In this proceeding for corporate reorganization under Section 77B of the National Bankruptcy Act, 27 the question arose upon the passage of the Public Utility Holding Company Act of 1935 28 whether the trustees of the debtor corporation should comply with the Act as a valid exercise of Congressional power. Trustees sought instructions and petitions were filed by two intervening creditors who disagreed as to the validity of the act, one opposing and one favoring a compliance with its provisions. Mr. John W. Davis was requested to assist in the presentation of the question to the court. Having given an opinion that the Act was unconstitutional, he had been employed by large utility interests to attack it. He

25 (1) As a necessary party who must be joined. (2) As an interested party who may be allowed to intervene, but who would be substantially limited in its conduct of the defense. (3) As an amicus curiae heard at the discretion of the court. See Note (1936) 45 Yale L. J. 649, 659.
accepted the opportunity upon condition that some creditor who had filed a claim in the proceeding would authorize him to appear. The lawyer and client met for the first time in the court-room when the case was called for argument. It was stated by the court 29: "Our constitutional law from the founding of the nation to the present time is replete with decisions of the Supreme Court, some of them of far reaching importance, declaring acts of Congress unconstitutional in suits to which the Government was neither a party nor appeared even as amicus curiae,30 and where the Government appeared only as amicus curiae." 31 The interest of the Government in the Public Utility Holding Company case was admittedly more direct, and yet the same principle was applied to it as to the preceding cases, namely, that of entertaining jurisdiction of a fictitious arrangement for prosecuting a suit in a matter of primary interest to the Federal Government, without according it the status of a party litigant. In effect, not only was the Government denied the right to protect its stronghold, but an enemy, as it were, was put within as its defender. To say the least, the speed which would be possible under H. R. 2260 is very desirable. Further, in eliminating hearings before circuit courts of appeals, the bill eliminates also the uncertainty that results from contradictory decisions 32 of lower federal courts on the same questions of law, and achieves a uniformity now wanting.

**Constitutional Safeguards**

If the act intends to foist upon the federal courts of the United States the duty less reluctantly to enter into analyses of acts of Congress to test their constitutionality, it is inevitable doomed to failure. Arrayed against such a possibility are the unbroken precedents which reiterate that the constitutionality of an act of

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31 First Employers' Liability Cases, 207 U. S. 463 (1908); Second Employers' Liability Cases, 223 U. S. 1 (1912); Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429 (1895); Hepburn v. Griswold, 8 Wall. 603 (1869); Ex parte Garland, 4 Wall. 333 (1866).
Government can be decided only when raised as a justiciable issue between parties in adverse interest in actual cases and controversies. The necessity under the proposed bill of determining at the outset whether or not a substantial ground exists for questioning the constitutionality of an act of Congress brings directly into play this and other cardinal principles upon which is conditioned the power of the Supreme Court to pass upon constitutional questions. As stated by Justice Iredell in Calder v. Bull: "If any act of Congress, or of the legislature of a state, violates those Constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case." (Italics supplied.) Other rules the Supreme Court has laid down for itself in exercising the power of measuring the statute by the Constitution follow: (1) It will not entertain a friendly proceeding. (2) The court will not anticipate a question of law in advance of the necessity of deciding it. (3) The court will not pass on a constitutional question if there is some other ground present. (4) The court will not pass on the validity of a statute on complaint of one who fails to show he is injured by its operation. (5) The court will not pass on the constitutionality of a statute at the instance of one who has availed himself of its benefits. (6) When the validity of an act of Congress is drawn into question, even though a serious doubt of constitutionality is raised, the court will first ascertain whether under any fair construction of the statute the question may be avoided.

Conclusion

The two proposed titles outlined above represent sound ideas, and should be enacted into the basic judicial system of our coun-

34 Luther v. Borden, 7 How. 1 (1849).
37 3 Dall. 386, 399 (U. S. 1798).
try. Hence, it would seem advisable, if such a procedure is possible, to separate them from the more highly controversial aspects of the proposed legislation. What was done by the recent amendment to the Judicial Code, extending to the Justices of the Supreme Court the retirement privileges long since afforded judges of the lower federal courts, might well be taken to point the way, by similar amendment, to make possible these other reforms which are so badly needed. Since there appears to be little, if any, difference of opinion concerning them, there is no reason why they should not be passed without delay, whatever disposition may ultimately be made of the remainder of the President’s plan.

F. B.

Pub. L. No. 10, 75th Congress, 1st Session, An Act to Provide for Retirement of Justices of the Supreme Court: “Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 260 of the Judicial Code (U. S. C., title 28, sec. 375), and the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench, but such Justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired Justice may be willing to undertake.” Approved March 1, 1937.

"First, no court shall pass upon the constitutionality of an act of Congress without notice to the Attorney General and an opportunity for the United States to present evidence and to be heard; and second, when the trial court shall pass upon such question there shall be a direct appeal to the Supreme Court, and that such cases shall take precedence over all other matters pending in the court. I am aware of no serious objections to these obviously necessary reforms". (Italics supplied) Remarks of Attorney General Cummings before the Senate Judiciary Committee, March 10, 1937, as published in (Washington, D. C.) The Evening Star, March 10, 1937, § A, 2.
PROPOSED LEGISLATION AMENDING THE FEDERAL TRADE COMMISSION ACT

THE SENATE INTERSTATE COMMERCE COMMITTEE reported to the Seventy Fifth Congress a bill 1 amending certain sections of the original act 2 which created the Federal Trade Commission. The amendment proposed is threefold in its application, and is designed:

1. To make unfair or deceptive acts and practices in commerce, as well as unfair methods of competition, unlawful 3; to authorize the Commission to apply to Circuit Courts of Appeal for enforcement of its orders whenever it has reason to believe any person has failed or neglected to obey or intends or is about to disobey such order, and to confer specifically on such courts authority to issue writs to protect the public or competitors pendente lite; and to enforce the orders of the Commission to the extent they are affirmed; and to make final and conclusive within 60 days all cease-and-desist orders of the Commission, unless the affected party seeks a court review within the 60 days.

2. To include specifically in the term "corporation" all trusts and so-called Massachusetts trusts issuing certificates of interest as well as capital or capital stock for profit of their members; and specifically to include in the description of "documentary evidence" all "books of accounts, financial, and corporate records". 4

3. To provide that a natural person, in order to be relieved from prosecution for nonperjured testimony given to the Commission in obedience to a subpoena, must claim his privilege against self-incrimination prior to testifying or producing evidence.

Background of Proposed Amendments

In order that there be a clearer understanding of the purpose of these amendments, a consideration of the nature and functions of the Federal Trade Commission should be in order here.

From its politico-legal origins, it is evident that the Commission was established to assure free competition in the production and distribution of goods upon the national market. The Clayton Act 5 and the Federal Trade Commission Act 6, under which the Com-

mission operates, were designed to fortify the Sherman Act. In effect in 1890 Congress saw in encouraged competition a regulator of trade and industry; therefore it forbade monopoly or the suppression of competition in any market. By 1914 it had been abundantly proved that a merely threatening measure for safeguarding competition was not sufficient; but faith in the underlying principles had not been lost.

It was not desired to set up an advisory board to negotiate the modus vivendi with business; nor was it proposed to substitute prudential cooperation through trade associations operating under administrative sanction for competitive regulation of the market. It seems rather than Congress, affirming its faith in competition, nevertheless desired through the Federal Trade Commission to see that competition was kept fair and healthy. The Trade Commission was set up as a continuous agency of inquiry and warning upon the legality of competitive methods.

Under Section 5 of the Federal Trade Commission Act, unfair methods of competition are declared unlawful. Upon complaint to the Commission an investigation may be ordered and the parties can be called before the Commission for a hearing on the complaint. The Commission then either dismisses the complaint, or issues a cease-and-desist order against the respondent, if the Commission finds the specific trade practices to be unfair methods of competition.

The procedure, it is seen, is merely preventive and cooperative, rather than penal. Any Circuit Court of Appeal "shall have . . . jurisdiction to affirm, set aside, or modify the order of the Commission".


\[8\] President Wilson's message of April 8, 1913, expresses most clearly the firm conviction and impassioned idealism in which the 1914 legislation had its genesis. "Consciously or unconsciously," he declared, "we have built up a set of privileges and exemptions from competitions behind which it has been easy for any, even the crudest, forms of combinations to organize monopolies until at last nothing is obliged to stand the tests of efficiency and economy in our world of big business; but everything thrives by concerted arrangements. Only new principles of action will save us from a final hard crystallization of monopoly and a complete loss of influences that quicken enterprise and keep individual energy alive.

"It is plain what these principles must be; we must abolish everything that bears even the semblance of privilege or any kind of artificial advantage, and put our business men and producers under the stimulation of a constant necessity to be efficient, economical, and enterprising, masters of competitive supremacy, better workers and merchants than any in the world." Woodrow Wilson in Messages and Papers of the President (Supp. 1913-1917) 7872.

The respondent always enjoys the right of appeal from the order of the Commission. If the respondent violates the cease-and-desist order, the Commission's only remedy lies in the court.

The Commission, then, is by nature a quasi-judicial body, determining what constitutes an unfair method of competition. Although there is still much confusion as to whether Congress in the original act gave the Commission the power to define an unfair method of competition, reference can be had to the language of the Senate Interstate Commerce Committee, in reporting the original bill on June 13, 1914:

"The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce, and to forbid their continuance, or whether it would by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason as stated by one of the representatives of the Illinois Manufacturers Association, that there were too many unfair practices to define, and after writing 20 of them into the law, it would be quite possible to invent others."

It is apparent that the phrase "unfair methods of competition" was adopted as the expression of policy behind the legislation. It is apparent from the above quotation that elimination of unfair practices was desired. Yet in the past two decades during which the various courts have considered and construed the jurisdiction of the Commission, the judicial construction placed on the words "method of competition" has forced the Commission to prove (a) competition, (b) injury to competitors and (c) public interest damage possibility, before it could be successful in ordering cessation of the unfair methods. It would seem that the rights of the general public were incidental to the rights of the various competitors.

It can safely be said that the Federal Trade Commission has never been a favored child of the courts. Beginning with the first cases to which the Commission was a party, the attitude of the judiciary has clearly been unfriendly. A trend toward widening the scope of the Commission's activities has been noticed within recent years however, and today the courts seem generally a bit more sympathetic toward the work of the Commission.

The historic unfavorable attitude originally taken by the courts may be explained in several ways. In the first place, the Supreme Court has always been somewhat wary of putting too much power into the hands of a governmental agency.10 And so far as activi-

10 Hankin, Validity and Constitutionality of the Federal Trade Commission Act (1924) 19 Ill. L. Rev. 17, 34. A good example of this can be
ties under Section 5 are concerned, the procedural set-up of the Act was not likely to get much sympathy from a judicial tribunal. Under the terms of Section 5, proceedings are to be started by a complaint issued by the Commission, which then sits to determine the merits of the complaint. Thus the Commission acts as both prosecutor and judge, and the courts, naturally enough, have scrutinized the decisions resulting with perhaps more care than otherwise would be the case.\textsuperscript{11}

Secondly, in its investigations under Section 6 of the Act, the Commission has constantly run afoul of the 4th and 5th Amendments to the Constitution. The Supreme Court, following a long line of prior decisions, has generally taken the strict view of these amendments.

Thirdly, under the terms of Section 5, the Commission is given jurisdiction to "prevent unfair methods of competition" when it appears that the proceedings will be "to the interest of the public". It further provides that "findings of the Commission as to facts, if supported by testimony, shall be conclusive".

In \textit{Federal Trade Commission v. Gratz},\textsuperscript{12} the first case to come before the Supreme Court under the Federal Trade Commission Act, the Court decided that the phrase "unfair methods of competition" was to be defined by the Court, not the Commission. For the Court, Mr. Justice McReynolds said:

"The words 'unfair methods of competition' are not defined by the statute, and their exact meaning is in doubt. It is for the Courts, not the Commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or possibly oppression, or as against public policy because of their dangerous tendency unduly to hinder competition as against free trade. The act was certainly not intended to fetter free or fair competition as commonly understood and practiced by honorable opponents in trade."\textsuperscript{13}

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\textsuperscript{12} 253 U. S. 421 (1920).

\textsuperscript{13} \textit{Id.} at 427.
Although that proposition might have been open to some doubt as an original question, it is now firmly established. In the *Winsted Hosiery Co. case,*\(^1\) the *Gratz case* was cited and used as authority to extend the Commission’s jurisdiction to cover false advertising and misbranding. The Commission’s activities in that field have been constantly increased, despite the protest of several minority opinions by justices who have insisted that, despite the *Winsted case,* the Federal Trade Commission Act was not intended to establish censorship over advertising. The courts have permitted the Commission to take steps to prevent offenses already prohibited by the anti-trust laws, so that a new agency has actually been supplied for their enforcement;\(^2\) but in few, if any, cases has the Commission been permitted to bridge the gaps left by those laws.\(^3\)

While the Supreme Court has thus permitted the Commission to act despite the absence of any lessening of competition, it has insisted that, unless there is some injury to competitors, a trade method, no matter how unfair, cannot be a method of competition, and the Commission therefore has no jurisdiction. Thus in the *Raladam Co. case*\(^4\) the Court refused to support the Commission in its efforts to suppress misleading and possibly harmful advertising of the “obesity cure”, because there was no substantial showing of injury to competitors.\(^5\) Although much criticism has

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\(^3\) Federal Trade Commission v. Beech Nut Packing Co., 257 U. S. 441 (1922); Shakespeare Co. v. Federal Trade Commission, 50 F. (2d) 41 (C. C. A. 6th, 1931). Of all the cases in which the Commission has been successful in preventing practices “tending toward a monopoly”, only Chamber of Commerce of Minneapolis v. Federal Trade Commission, 3 F. (2d) 673 (C. C. A. 8th, 1926) does not cite Sherman Act precedents.

\(^4\) Thus the Commission has been unsuccessful in stopping the gap left in the Clayton Act by Swift & Co. v. Federal Trade Commission, 272 U. S. 554 (1926); Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 619 (1928).


\(^6\) This decision held that there was no substantial showing of injury to the competitors which might be subjected to question. The Court disposed of the contention of injury to competing physicians by declaring that they were not entitled to protection because “they follow a profession and not a trade . . .”. Sutherland, J., 283 U. S. 643, 653 (1931). *Cf.* Federal Trade Commission v. Kay, 35 F (2d) 160 (C. C. A. 7th, 1929), where the inferior federal court reaches an opposite conclusion on identical facts.
been heaped on the Court for this decision, it still stands as law today.  

In the recently decided Keppel Bro. case the Court seemed more favorably inclined toward the work of the Commission. In that case the Court upheld the Commission’s decree preventing respondent from selling candy boxes containing prizes and premiums (so-called “break-and-take” packages). Mr. Justice Stone pointed out that school children were induced to buy inferior candy in the usually vain hope of winning a penny prize. Such merchandise, which took advantage of children incapable of exercising better judgment, was held to be within the statutory definition.

This decision seems to have a double significance. In the first place, the dictum of the Gratz case, requiring “deception, bad faith, fraud or oppression” or “a tendency unduly to hinder competition”, which has plagued the Commission since that opinion was written, was impliedly rejected by the court. It was specifically pointed out that there was no fraud, nor any tendency to create a monopoly. Thus a wider scope of activity seems to be opened to the Commission, which apparently may exercise jurisdiction over any method of competition which might be characterized as unfair, whether it is likewise fraudulent or tends to create a monopoly.

Secondly, the Court’s language was even more important. The proposition that “unfair methods of competition” were to be interpreted by the Court was repeated. But Mr. Justice Stone added:

“. . . in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in a body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected; and it was organized in such manner, with respect to the length and expiration of term of office of the members, as would give to them an opportunity to acquire the expertness in dealing with these special questions concerning the industry that comes from experience.

“If the point were more doubtful than we think it, we should hesitate to reject the conclusions of the Commission, based as they are upon clear, specific, and comprehensive findings supported by the evidence.”

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20 Handler, The Jurisdiction of the Federal Trade Commission Over False Advertising (1931) 31 Col. L. Rev. 527, where the writer denies the necessity of any competition.
Apparently this is the first time that the Court has expressly recognized that the Commission is a body of experts, much better qualified to pass upon the unfairness of methods of competition than the judicial body. Surely in the past the courts have not hesitated to reject the findings of the Commission. The language of the Court here would seem to point to a more liberal recognition of the work of the Commission than has been accorded it in the past.

Nevertheless it must be admitted that to rely on a possible liberal trend in the Court's interpretation would be to invite delay and slow development. Hence it is that Congress desires to clarify Section 5 of the Federal Trade Commission Act. And the Senate Interstate Commerce Committee believes that such a clarification can be obtained by extending specifically the jurisdiction of the Commission to include power to restrain unfair and deceptive acts and practices which deceive and defraud the public generally without being put to the necessity of proving that the competitors of the offender have suffered monetary damage.

Importance of Suggested Legislation

Thus it is seen that the legislation under discussion is of far greater importance to the public generally than merely a change in procedure would indicate. Congress never intended to set up in the Commission a forum where private disputes and controversies between competitors would be settled. And yet heretofore it evidently was necessary to look on the jurisdiction of the Commission as embracing that very purpose, with an incidental observation as to the public interest involved. In the Klesner case 24 Mr. Justice Brandeis laid the liberal judicial steps in the direction along which the proposed legislation would extend the Commission's jurisdiction. He said:

"A complaint may be filed only if it shall appear that a proceeding by the Commission in respect thereto would be to the interest of the public. This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of the purchasers, or even that they have been deceived. It is true that in suits by private traders to enjoin unfair competition by 'passing off', proof that the public is deceived is an essential element to the cause of the action. This proof is necessary only because the plaintiff otherwise has not suffered an injury. There, protection of the public is an incident of the enforcement of a private right. But to justify the Commission in filing a complaint under Section 5, the purpose must be protection of the public. The protection thereby afforded to the private persons is the incident."

The public interest, as such, has never been the cause of trouble to the judges. The Court, in one of the first cases testing the powers of the Commission, disposed of the objection that the public injury had not been shown by declaring that public injury was not necessary because "... the remedy afforded by statute is preventive, not compensatory". The Court further declared that "To destroy competition and to compete unfairly are not necessarily equivalent ...". Public interest need not be specifically found where competition is being destroyed, since that fact alone is sufficient to establish such interest. But there must be a finding of public interest where the case is one merely of "competing unfairly".

Because of the absence of a norm by which to measure "unfair practices" the courts sometimes have been inconsistent in dealing with findings of the Commission. The proposed legislation will lend valuable assistance in this matter of ascertaining if the Commission is acting within the purview of its jurisdiction. And the courts seem to have picked on the provision that "the findings of the Commission as to facts, if supported by testimony, shall be conclusive" a loophole to explain their conflicting decisions. For example:

1. Some courts have declared, that in fact there was no testimony to support the findings. In Algoma Lumber Co. v. Federal Trade Commission the Circuit Court of Appeals declared that upon weighing the evidence, there was no evidence to support the conclusions reached. The Supreme Court in overruling the decision, reprimanded the lower court for paying attention in merely a "lip-service" manner to the words of the statute.

2. The Courts have declared that the alleged fact findings are really findings of opinion, and hence not conclusive. In the Raladam case the Circuit Court of Appeals held that the Commission's findings that marmola was "unsafe and unscientific" were merely matters of opinion. The Supreme Court upheld this decision, pointing out also that there was no showing of injury to competitors.

3. In Federal Trade Commission v. Curtis Publ. Co. the Supreme Court declared that while the findings of the Commission

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26 Id. at 712.
27 64 F. (2d) 618 (C. C. A. 9th, 1933).
29 42 F. (2d) 430 (C. C. A. 6th, 1930).
30 260 U. S. 568 (1923).
were conclusive, the court could find "additional facts". Justices Taft and Brandeis vigorously protested this statement. The justification for this case lies in the fact that the findings, while literally correct, presented a distorted view of the actual situation. This doctrine has been repeated in other cases, and in these the holding is difficult to justify.81

The result of such cases inevitably has been that the Commission has often had its work nullified, and much of the Commission's usefulness has thereby been destroyed. It is expected that more than "lip-service" by the Courts to the statutory formula will be obtained under the proposed legislation.

The inclusion of the terms "trusts" and so-called Massachusetts trusts is to clear up any doubt as to the definition of a corporation. There are some extensive businesses operated under the so-called common law or Massachusetts trust which resembles a corporation in many particulars. The definition of "anti-trust acts" in Section 4 is amended by specifically including the anti-trust definition of the Clayton Act, which was approved October 15, 1914, subsequent to the passage of the Federal Trade Commission Act.

The inclusion of "books of accounts, financial, and corporative records" in the definition of "documentary evidence" is to remove any doubt that such books and records are included in the documentary evidence subject to the Commission's inspection and subpoena under Section 9 of the present act. The Commission itself has experienced difficulty in interpreting its powers in this respect; hence the clarification.

There has always been some doubt as to the power of subpoena under Section 9. In the Millers' National Federation case 32 the Court of Appeals for the District of Columbia held that the power of subpoena to compel attendance and testimony of witnesses and the production of documentary evidence is limited to formal proceedings. The Court seemed to base its decision upon the ground that the resolution of the Senate—pursuant to which the power of subpoena was exercised—was tantamount to a delegation of power vested in the Senate itself. Under this ruling the Commission would have no such power when proceeding on its own initiative.

In the *Electric Bond and Share case* 33 the U. S. District Court for the Southern District of New York sustained the power of the Commission to issue subpoena for the attendance of witnesses for oral testimony, but circumscribed and limited its power to subpoena documentary evidence.

The proposed amendment is clarifying and removes any uncertainty arising out of the foregoing decisions, by expressly conferring upon the Commission the power, as was undoubtedly the original intention, to subpoena witnesses for oral testimony and to examine and subpoena documentary evidence. It is customary to confer this power upon investigating and fact-finding agencies. 34 As for the danger of abuse of this power by the Commission, even alarmists should be satisfied, since the command of the subpoena can be enforced only by an order from a district court of the United States.

The present section 35 relative to immunity of a witness from prosecution is amended to provide that this immunity shall not attach to a witness unless he claims his privilege prior to testifying or producing evidence. The fact that he made the claim actually prior to giving the testimony or producing the evidence would put the Commission on notice that he intends to claim immunity, in time for the Commission to decide whether the public interest would be better served by granting the immunity or by foregoing his testimony or production of evidence.

**Conclusion**

The inevitable conclusion to be reached after considering the background and purpose of the proposed legislation is that it is wise in purpose, sufficient in clarification of doubtful and misinterpreted points, and destined to redound favorably to the interests of the public generally.

T. E. N.

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34 As for example with the Interstate Commerce Commission. "... and for the purpose of this chapter, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of any books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation." 34 STAT. 383 (1887), 49 U. S. C. A. § 12 (Supp. 1936).

THE BITUMINOUS COAL ACT OF 1937 *

THE BITUMINOUS COAL CONSERVATION ACT OF 1935,1 which had for its purpose the stabilization of prices and wages in the soft coal industry, was declared unconstitutional by the Supreme Court in May, 1936, in the case of Carter v. Carter Coal Co. Mr. Justice Sutherland, writing the majority opinion, said, in part:

"Thus the primary contemplated of the act is stabilization of the industry through the regulation of labor and the regulation of prices; for, since both were adopted we must conclude that both were thought essential. The regulation of labor on one hand and prices on the other furnish mutual aid and support; and their associated force—not one or the other but both combined—was deemed by Congress to be necessary to achieve the end sought. The statutory mandate for a code upheld by two legs at once suggests the improbability that Congress would have assented to a code supported by only one. . . . Thus wages, hours of labor, and working conditions . . . and prices . . . are so woven together as to render the probability plain enough that uniform prices, in the opinion of Congress, could not be fairly fixed or effectively regulated, without also regulating these elements of labor which enter so largely into the cost of production . . . . The conclusion is unavoidable that the price fixing provisions of the code are so related to and dependent upon the labor provisions as conditions, considerations or compensations, as to make it clearly probable that the former being held bad, the latter would not have passed. The fall of the former, therefore, carries down with it the latter." 2

Conditions in the coal industry had begun to improve under the regulations of the Commission set up by the Act. The voiding of the Act by the Court threatened to bring about the return of the industry to the cut-throat practices of unfair competition previously so prevalent. In order to preserve, as much as possible, the benefits already realized, and to assure the continuation of the federal control which was rehabilitating the soft coal industry, Congress undertook to pass another bill, similar to the one invalidated by the Court, but lacking the labor control provisions which had been found objectionable. This bill 3 was passed by the House of Representatives; but it was the object of a successful filibuster in the Senate in the closing days of the last session of the 74th Congress. Upon the opening of the present session of Congress, however, the bill was resubmitted and passed by the House and Senate. The Senate made certain amend-

* Written April 10, 1937.
ments to the bill as passed by the House, necessitating its return to the House for approval as amended. It is this bill, entitled the Bituminous Coal Act of 1937,4 which is to be considered here.5

The proposed Act divides the country up into twenty-three districts, and provides for the establishment of a code committee in each district.6 These code committees, under the supervision of a National Bituminous Coal Commission 7 in the Interior Department,8 determine minimum prices for coal within their respective districts, and make rules and regulations to enforce the restrictions against unfair competition as set out in the Act.9 A tax of one per centum is levied on the price of all coal sold or otherwise disposed of by any producer in the United States.10 A tax of nineteen and one-half per centum is also levied on all coal sold or disposed of by any producer within the United States; but if a producer becomes, and remains, a code member, in accordance with the terms of the Act, the sale or disposal of coal produced by him is to be exempt from this tax.11 Exemption from this tax is also allowed where the producer shows that he is engaged in intrastate commerce in bituminous coal, the nature of which is such that it does not directly affect any interstate commerce in that commodity.12 The office of consumers' counsel is also established, the duty of the incumbent thereof being to protect the interests of the consuming public in hearings before the Commission and in independent investigations.13 The counsel is to be paid $10,000 per annum by the Government, and must submit an annual report to Congress on the activities of his office.14

The members of the House Ways and Means Committee who objected to the passage of the bill were of the opinion that the composition of the Commission will be such that the workers will have but little protection, and the producers will reap all the benefits; and that the district boards will be controlled by the large producers, with the result that the smaller mines will be

5 Hereinafter referred to as "the proposed Act".
7 Hereinafter referred to as "the Commission".
9 Id. at § 4, II.
10 Id. at § 3(a).
11 Id. at § 3(b).
12 Id. at § 4-A.
13 Id. at § 2(b) (1), (2), (3).
14 Id. at § 2(b) (4).
forced out of business. They had this to say about the consumers' counsel:

"The 'interests' responsible for the bill have with apparent magnanimity provided for a consumers' counsel, to be paid by the Government, who is authorized to represent the consumers of the country in all price fixing proceedings before the Commission. They can well afford to make this gracious gesture, well knowing that however able and sincere he may be, he will be but a voice crying in the wilderness, since they have the votes on the Commission to work their own will. For this reason it is problematical whether any benefits will accrue to consumers through the efforts of the consumers' counsel." 16

Regardless of the merit of the above criticisms, it is believed that the proposed Act contains certain provisions subject to attack on constitutional grounds. A consideration of possible defects is pertinent at this time, inasmuch as it is the opinion of some that this proposed Act, if valid, is a forerunner and model for future legislation.

A constitutional basis is sought to be established in Section 1, setting forth the necessity for the proposed Act, wherein it is stated:

"That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

This is strengthened by the declaration in Section 4:

"For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal. . . ."

The validity of the declared purpose of the proposed Act cannot be questioned. Congress is expressly given the power to regulate interstate commerce, and to make all laws necessary and proper to attain that end.17 Some doubt is occasioned, however, by a consideration of certain statements made by proponents of the bill with respect to its purpose and intent. In the report submitted to the House of Representatives by its Committee on Ways and Means appears the following passage:

"The demoralization of the price structure in the industry which prior to the 1935 act existed for many years, was in large part respon-

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16 Id. at 33.
sible for the low wages and poor working conditions in the industry, and for the strikes, in many instances accompanied by violence and bloodshed, which resulted therefrom. It is the opinion of the committee that the stabilization of prices which the bill seeks to effect and the resulting guarantee to operators of a fair price for their coal will go a long way toward stabilization of labor conditions in the industry and toward the guarantee to the miners of satisfactory working conditions and a living wage."  

In the report submitted to the Senate by its Committee on Interstate Commerce appears the following passage:

"Labor constitutes 60 per cent of the total cost of the production of bituminous coal. It is practically the only cost factor that is flexible. Consequently the wage earners in the industry and those dependent upon them have uniformly been the outstanding victims of the intense suffering caused by the savage, competitive warfare which for nearly three decades has cursed every important coal field in the United States. Times without number the wages of the miners have been generally reduced to levels far below those required to supply the bare necessities of life. The destitution which miners' wives and children have suffered defies exaggeration and surpasses the possibility of belief by those who have not been eyewitnesses to the hideous tragedy."  

Labor costs and wage rates seem to have been primary considerations in the minds of the framers of the proposed Act. They admit that sixty per cent of the cost of production is that of the labor involved. They further admit that "it is practically the only cost factor that is flexible." Does it not follow, reasonably, that the ultimate end to be served in the establishment and adjustment of minimum prices is the maintenance of wage rates at a certain level? This would be attempting to accomplish by indirect means the very object which, in the Carter case, the Court ruled Congress could not effect by direct means. That Congress cannot, by indirect, accomplish that which it is forbidden to effect by direct means, is brought out in many cases.

Assuming, however, that the Court will not look beyond the Act itself (if and when passed) to determine the validity of its purpose, let us consider another feature. The nineteen and one-half per centum tax is purely regulatory. Its exaction is intended not

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as an exercise of the taxing power but of the power to regulate interstate commerce,22 which is within the power expressly granted to Congress.23 The regulatory nature of the tax, therefore, cannot be attacked. But in the delegation of power to levy the tax and determine who shall be exempt therewith from the proposed Act seems to overstep the bounds of constitutionality. The district boards are composed of from three to seventeen members, elected by the producers of the district.24 The Commission is made up of seven members, appointed by the President, two of whom shall have had experience as coal producers and two of whom shall have had experience as coal-mine workers.25 The district boards will be controlled by coal producers; and on the Commission the industry will have a working majority. Thus, from the time prices are proposed by the district boards until they are finally approved by the Commission the bituminous coal industry has a free hand in fixing its own prices which consumers will be obliged to pay. This would seem to approximate an improper delegation of legislative power. It gives to the industry itself the power to regulate interstate commerce in soft coal. The following language of Chief Justice Hughes in the Schechter case26 may be indicative of the possible attitude of the Court with respect to this phase of the proposed Act:

"The Government urges that the codes will 'consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.' Instances are cited in which Congress has availed itself of such assistance; as e. g., in the exercise of its authority over the public domain, with respect to the recognition of local customs, or rules of miners as to mining claims, or, in matters of a more or less technical nature, as in designating the standard height of drawbars. But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficial for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or group be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."27

22 81 CONG. REC., March 19, 1937, at 2568.
25 Id. at § 2(a).
27 Id. at 537.
It is true that the proposed Act provides detailed instructions for the procedure to be followed in computing minimum prices. It sets up what is apparently an intelligible standard to be applied. In that respect it differs from the Act condemned by the Court in the Schechter case, which was characterized as "a delegation running riot". But the administrative body authorized to apply that standard is not a governmental one. It is one composed of individuals whose duty to administer the Act may be opposed to, and in conflict with, their own personal interests. The validity of this delegation of power cannot, it seems, derive much support from the provision that no member of the Commission may be financially interested, directly or indirectly, in the industry. Lack of pecuniary interest is no guarantee of impartiality.

A study of certain other portions of the proposed Act raises the question whether or not there is any denial of due process. As the Court pointed out in the Indiana chain store tax case, due process of law and the equivalent phrase, law of the land, have frequently been defined to mean a general and public law operating equally on all persons in like circumstances; and not a partial or private law affecting the rights of a particular individual or class of individuals in a way in which the same rights of other persons are not affected. Under this guaranty not only must a statute embrace all persons in a like situation, but the classification must be natural and reasonable, not arbitrary or capricious. Sections 4-A and 6(b) and (c) of the proposed Act require that a producer who objects to compliance (believing that the nature of his business is such as not to be subject to the nineteen and one-half per centum tax) must submit his case to the Commission. The findings of that body are conclusive as to fact, when supported by the evidence. The only appeal available is to a circuit court of appeals. In spite of the fact that he may be subjected to a penalty of nineteen and one-half per centum on all coal he sells or otherwise disposes of, the objecting producer is denied the right to have a jury hear his case. Instead he must submit to the determination of a Commission which may be composed of men not qualified to act impartially. It might well be argued that such a procedure amounts to a denial of due process of law, within the Fifth Amendment, to say nothing of the de-

28 H. R. 4985, 75th Cong., 1st Sess. (1937), § 4, pt. II.
30 Id. at 553.
privation of the right of trial by jury provided in the Seventh Amendment for all suits at common law wherein the amount in controversy exceeds twenty dollars.

Under part II of Section 4 are listed twelve practices considered as unfair methods of competition, constituting violations of the code. One of these unfair methods of competition is declared to be:

"The unauthorized use, whether in written or oral form, of trademarks, trade names, slogans, or advertising matter already adopted by a competitor, or any deceptive approximation thereof."

The Commission may revoke the membership of any code member violating any of the provisions of the code.\(^3\) This revocation would deprive the former member of his exemption from the nineteen and one-half per centum tax.\(^4\) To be reinstated as a code member, he must pay a penalty equal to double the tax provided in Section 3(b) (nineteen and one-half per centum) on the coal sold or otherwise disposed of in violation of the code.\(^5\) However, Congress has already provided a penalty for the infringement of a trademark used in interstate commerce. By statute it has been provided that the owner of such a trademark may recover, at the discretion of the court, threefold damages from the infringer.\(^6\) Any person, therefore, infringing a trademark used in interstate commerce, may be liable for the statutory penalty of triple damages. However, if the happens to be a bituminous coal producer his penalty is much heavier. Can such discrimination be justified? It seems that the offense is the same, and should be subject to the same penalty whether it is committed by the producer of natural gas, or oil, or bituminous coal. Applying this severe penalty to bituminous coal producers engaged in interstate commerce might not be considered as a reasonable classification but rather an arbitrary one. If so, it amounts to a deprivation of due process of law.

In favor of the constitutionality of the proposed Act, it may be said that although the five justices who concurred in the majority opinion in the *Carter case*\(^7\) did not pass upon the price-fixing provisions of the 1935 Act because in their view such provisions were inseparable from the labor provisions. Mr. Justice Cardozo,

\(^{33}\) H. R. 4985, 75th Cong., 1st Sess. (1937), § 5(b).

\(^{34}\) *Ibid.*

\(^{35}\) *Id.* at § 5(c).


in a dissenting opinion 38 conurred in by Mr. Justice Brandeis and Mr. Justice Stone, held that the price-fixing provisions were constitutional and were separable from the labor provisions.39 Furthermore, the Supreme Court has always adhered to the doctrine that it cannot inquire into the motives of the legislature in passing a statute, or into the justice, wisdom, expediency or policy of the statute itself. The sole question before the Court is whether the legislature had the power to pass the statute.40 Accordingly, the Court may ignore the fact that the proposed Act is aimed at the maintenance of wages at an adequate level. Finally, it is well known that every reasonable presumption must first be indulged in favor of the constitutionality of the Act, and that every intendment is in favor of its validity. It must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears,41 or is made to appear beyond a reasonable doubt.42 Indulging these presumptions weakens considerably the force of the arguments raised against the validity of the bill, and tends to indicate that the proposed Act may escape the fate of its predecessor.

A. F. O.

38 Id. at 324.
39 See separate opinion of Mr. Chief Justice Hughes (dissenting in part), Id. at 317.
42 Legal Tender Cases, 12 Wall. 457 (U. S. 1871); Sinking Fund Cases, 99 U. S. 700 (1878).
Proposed Federal Crop Insurance Bill

The disastrous crop failures of the past few years with their attendant evil effects on the agricultural part of our population have brought home the realization that of all occupations the tillage of the soil is most completely at the mercy of forces beyond the control of the operators. Also, it has been pointed out at a cost of suffering and ruin to a large share of our people, that at present there is nothing available to alleviate the results of the adverse operation of these forces. If a farmer plants a crop and insufficient rain falls, his crop dries up and dies. If, on the other hand, he plants and harvests a bumper crop, prices of the commodity fall to such an extent that he does not make up for lean years. It has been proved by experience that a series of bad crop years utterly ruins small farmers and throws them on charity. It is apparent that the causes of good and bad crop years lie outside of the control of the farmer.

Now, in other businesses losses due to unavoidable risks, such as fires, cyclones, deaths of important men, and the like, have been to a large extent covered by insurance, a method whereby the loss is spread over a large number of items (or people) exposed to the risk. Certain of the farmer’s risks are likewise covered, but they are only those such as loss from fire and hailstorm.

As early as 1889 a German economist studied and recommended agricultural insurance for Japanese farmers. This plan was not adopted by Japan but was tried out at various times in this country by private insurance companies, which, however, uniformly experienced net losses and were forced to quit the field.\footnote{It was about 1889 that P. Mayet, at the request of the Japanese Government, made his study and wrote a book entitled (in the English translation) Agricultural Insurance: Notes on Agricultural Insurance in Organic Connection with Savings Banks, Land Credit, and the Commutation of Debts. A small experiment was tried in this country in 1899 but failed. In 1917 three companies wrote crop insurance but all failed in their first year of operation. Again in 1920 a larger effort was made at all-risk insurance for crops, but as in the former attempts the only result was serious loss to the insurers, and the plan was abandoned. Other trials were made in 1921, 1931, and 1932 but none was successful. At present no insurer is offering all-risk crop insurance. H. R. Doc. No. 150, 75th Cong., 1st Sess. (1937).} However, owing to increasing pressure to put agriculture on a business basis, as well as to relieve the federal government of the heavy relief burden imposed by the distress of the farmers, the President appointed\footnote{September 19, 1936.} a Committee on Crop Insurance to study...
the situation and if possible to recommend some feasible plan of “all-risk” crop insurance, including some system of storage reserves to receive the surplus of fat years and hold it for lean years. The Department of Agriculture had been collecting facts on plantings and losses for some time prior to the appointment of this Committee, and the President logically appointed the Secretary of Agriculture to head the Committee and suggested the use of the assembled data.

After some months of investigation in collaboration with various farmer’s organizations and with insurance companies engaged in writing the present limited forms of crop insurances available, the committee rendered its report. In the opinion of the committee “all-risk” crop insurance was feasible, and definite recommendations were made for legislation to initiate it. An outstanding feature recommended is that the federal government pay the operating and storage costs and provide sufficient funds to cover extraordinary expenses such as heavy losses in the early years of operation. Another feature is the insurance of yields only, not prices or income to the producer. The report further contains recommendations for insuring only wheat crops for the present, for insuring only a percentage of the average yield of the farm, for basing the premiums on individual and regional loss experience, for collecting premiums in kind or cash equivalent, and in the discretion of the insuring body, for requiring a minimum amount of participation by the community as a condition precedent to insuring an individual in the community.

3 December 23, 1936. Message from the President of the United States transmitting the Report and Recommendations of the President’s Committee on Crop Insurance, H. R. Doc. No. 150, 75th Cong. 1st Sess. (1937).

4 Previous insurance attempts along this line failed for several reasons; 1, insurance was only over a limited area making it subject to great local loss with small spread of the risk; 2, income rather than crop yields was insured, thus involving the variable price risk; 3, inadequate actuarial data; 4, insufficient capital to meet losses in early years of operation; 5, errors in administration. H. R. Doc. No. 150, 75th Cong., 1st Sess. (1937), cited supra. n. 3.

5 “The following recommendations are therefore made by your committee.

1. That a plan of crop insurance for wheat be recommended to Congress for consideration at an early date so that it may be put into effect on the 1938 crop.

2. That administration of any crop-insurance program be a function of the Department of Agriculture, coordinated and integrated with the other programs and functions of that Department.

3. That in view of the public interest in crop insurance, including a greater degree of stability of supplies and income, and reducing prospective special measures of relief to distressed areas, the costs of storage should be
On the basis of this report Senator Pope (Idaho) introduced a bill entitled "A Bill to create a Federal Crop Insurance Corporation, and for other purposes." This bill provides for the formation of a corporation to be called the "Federal Crop Insurance Corporation", with a capital stock of $100,000,000 subscribed by the United States and subject to call by the board of directors of the Corporation. The directors are to be appointed by and to be under the supervision of the Secretary of Agriculture. The

borne by the Government, together with all overhead costs of administration. Adequate funds should be made available to the administering agency to meet requirements for:

(a) Overhead administrative expenses.
(b) The purchase and handling of commodities necessary to initiate the program.
(c) Reserves adequate to meet extraordinary needs such as might arise out of a series of low yields during the early years of operation of the program.

4. That any proposed legislation provide for—

(a) Insurance of crop yields only without insurance of price.
(b) Employing the farmer's own average yield, as determined from a representative base period as the basis of insurance coverage.
(c) Insurance of only a designated percentage of the producer's average yield.
(d) Determination of premiums on the basis of individual and regional loss experience.
(e) Payment of premiums and indemnities in kind or cash equivalent.
(f) Holding insurance reserves in the form of the stored commodity for which the insurance is written.
(g) Writing of insurance, adjustment of losses, and general local administration through local committees or boards of directors.

5. That the premiums charged the insured be such as actuarial studies and accumulated experience indicate are necessary to cover crop losses for a period of years.

6. That the administering organization be authorized to require a minimum amount of participation in the crop-insurance program from counties or regions before the insurance will be sold therein.

7. That storage of wheat reserves for insurance purposes shall be made in federally bonded warehouses or State-licensed warehouses that satisfactorily meet requirements or in other ways that will adequately protect the interests of the Government and the farmers insured.

8. That crop-insurance research be continued by the Department of Agriculture in order to facilitate administration of any crop-insurance program that may be instituted." H. R. Doc. No. 150, 75th Cong., 1st Sess. (1937), cited supra, n. 3, 4.

* S. 1397, 75th Cong., 1st Sess., introduced Feb. 8, 1937, reported with amendments March 23, 1937.
* Id. at § 2.
* Id. at § 3(a).
* Id. at § 4(a).
Corporation is to have the usual powers of a corporation regarding a seal, owning and disposing of property, and the like, and is to be exempt from "injunction, garnishment, or other similar process, mesne or final". It may, however, be sued "in the district court of the United States in and for the district in which the insured farm is located" for failure to pay any claim for indemnity subject to a one year statute of limitations after the notice of denial of the claim is mailed by the Corporation.

Provisions are made with regard to employees, for utilizing other agencies of the government, for conducting surveys, and for utilizing or establishing bodies to administer the Act.

With regard to its operation, the proposed Corporation will be authorized and empowered to insure producers of wheat against

\[10\text{ Id. at § 5(a), (b), (c).}\]
\[11\text{ Id. at § 5(d).}\]
\[12\text{ Id. at § 7(c).}\]
\[13\text{ Id. at § 6(a), (b).}\]
\[14\text{ Id. at § 5(g).}\]
\[15\text{ Id. at § 5(h).}\]
\[16\text{ Id. at § 6(c), (d), (e).}\]

"(a) Commencing with the wheat crop planted for harvest in 1938, to insure, upon such terms and conditions not inconsistent with the provisions of this Act as it may determine, producers of wheat against loss in yields of wheat due to unavoidable causes including drought, flood, hail, wind, winter-kill, lightning, tornado, insect infestation, plant disease, and such other causes as may be determined by the Board. Such insurance shall not cover losses due to the neglect or malfeasance of the producer. Such insurance shall cover a percentage, to be determined by the Board, of the recorded or appraised average yield of wheat on the insured farm for a representative base period subject to such adjustments as the Board may prescribe to the end that the average yields fixed for farms in the same area which are subject to the same conditions may be fair and just. The Board may condition the issuance of such insurance in any county or area upon a minimum amount of participation in a program of crop insurance formulated pursuant to this Act.

(b) To fix premiums for such insurance, payable either in wheat or cash equivalent as of the due date thereof, on the basis of the recorded or appraised average crop loss of wheat on the insured farm for a representative base period subject to such adjustments as the Board may prescribe to the end that the premiums fixed for farms in the same area, which are subject to the same conditions, may be fair and just. Such premiums shall be collected at such time or times, in such manner, and upon such security as the Board may determine.

(c) To adjust and pay claims for losses either in wheat or in cash equivalent under rules prescribed by the Board. In the event that any claim for indemnity under the provisions of this Act is denied by the Corporation an action on such claim may be brought against the Corporation in the district court of the United States in and for the district in which the insured farm is located, and exclusive jurisdiction is hereby conferred upon such courts
losses in yields due to unavoidable causes specified and others in the discretion of the Board in substantially the manner and on the conditions contained in the recommendations of the President's Committee on Crop Insurance.\textsuperscript{18} The percentage of yield to be insured is left to the discretion of the Board, as is the requirement of regional participation in the program.\textsuperscript{19} The premiums may be paid either in wheat or cash equivalent.\textsuperscript{20} The losses may be paid in either wheat or cash equivalent under rules to be prescribed by the Board.\textsuperscript{21} The Corporation is to keep the wheat paid as premiums or buy wheat to the amount of the cash equivalent paid as premiums, to sell and replace wheat in danger of deterioration through storage, and to sell to the extent necessary to cover indemnity payments.\textsuperscript{22} Also, the insurance contracts are to embody this restriction as to the use to be made of the wheat, and the insured is given unlimited remedies to enforce this restriction.\textsuperscript{22} In order to get the indemnity payment into the hands of the insured it is provided that the claims may not be interfered with before payment except as to claims due the Corporation arising under the Act.\textsuperscript{23}

to determine such controversies without regard to the amount in controversy: Provided, That no suit on such claim shall be allowed under this section unless the same shall have been brought within one year after the date when notice of denial of the claim is mailed to the claimant.

(d) From time to time, in such manner and through such agencies as the Board may determine, to purchase, handle, store, insure, provide storage facilities for, and sell wheat, and pay any expenses incidental thereto, it being the intent of this provision, however, that, insofar as practicable, the Corporation shall purchase wheat only at the rate and to a total amount equal to the payment of premiums in cash by farmers or to replace promptly wheat sold to prevent deterioration; and shall sell wheat only to the extent necessary to cover payments of indemnities and to prevent deterioration: Provided, however, That nothing in this section shall prevent prompt offset purchases and sales of wheat for convenience in handling. The restriction on the purchase and sale of wheat provided in this section shall be made a part of any crop insurance agreement made under this Act. Notwithstanding any provision of this Act, there shall be no limitation upon the legal or equitable remedies available to the insured to enforce against the corporation the foregoing restriction with respect to purchases and sales of wheat. Wheat acquired under the provisions of this Act shall be kept in federally bonded or State licensed warehouses or in such other manner as the Board determines will adequately protect the interests of the Corporation and the producers insured.” S.1397, 75th Cong., 1st Sess. (1937).

\textsuperscript{18} H. R. Doc. No. 150, 75th Cong., 1st Sess. (1936), cited supra, n. 1, 3, 4, 5.
\textsuperscript{19} S. 1397, 75th Cong., 1st Sess. (1937), at § 7(a).
\textsuperscript{20} Id. at § 7(b).
\textsuperscript{21} Id. at § 7(c).
\textsuperscript{22} Id. at 7(d).
\textsuperscript{23} Id. at § 8.
The Corporation is designated as a fiscal agent of the United States under the control of the Secretary of the Treasury for that purpose. The usual criminal provisions in such an act are provided. The sum of not more than $10,000,000 yearly may be appropriated for the Corporation's operating expenses. The several provisions of the Act are declared separable in the event one or more is declared unconstitutional.

The Question of the Legality of the Act

Several grounds of congressional authority appear in the bill. The preamble to the bill recites that it is to "promote national welfare by alleviating the economic distress caused by wheat crop failures and other causes, maintaining the purchasing power of farmers, and providing for stable supplies of wheat for domestic consumption and the orderly flow thereof in interstate commerce,". The federal government is called upon to put up

24 Id. at § 11.
25 Id. at § 13.
26 Id. at § 15.
27 Id. at § 16.
28 From an economic standpoint this program of insurance appears highly desirable. It will guarantee to participating growers a minimum yield, determined as a percentage of the average yield for each farm, regardless of growing conditions. The premiums may be deferred in the discretion of the Board so that they may be paid out of crops grown in good years. The premiums are payable in kind or an amount of cash with which the Corporation can buy an equivalent quantity of wheat. This premium wheat is to be stored until needed to pay off indemnity claims and then delivered in kind in amount according to the insurance contracts, or, on order of the insured, sold and the cash turned over to him. The premiums would be paid in good crop years when prices are low and indemnities in cases of widespread crop failures would be paid in bad crop years when prices are high. The farmer thus profits both ways. This arrangement is made possible by insuring a yield rather than an income and by collecting, storing, and paying off in crops rather than in money. The storage system approaches the ideal of the "ever-normal granary" and in the event of general adoption of the insurance by farmers would serve materially to prevent large price fluctuations in the commodity insured. Excesses in good years would be stored as premiums and so taken off the market and returned in poor years so that the amount of the commodity on the market in any one year would approach a constant value.

There is still sufficient inducement under the plan for a farmer to do his utmost in raising a large crop because only a percentage of his average yield is insured and in a good year he can by producing a crop larger than his guaranteed yield greatly increase his income. The real value lies in assuring a definite yield regardless of unavoidable hazards. As a matter of fact the fractional yield insured may in a generally poor crop year be equal in money to an average crop in a year of plenty. See S. 1397, § 7(b).
29 S. 1397, 75th Cong., 1st Sess. (1937), § 1.
$100,000,000, available at once,\textsuperscript{30} and to appropriate up to $10,000,000 yearly for expenses of the Corporation.\textsuperscript{31} The Corporation is further appointed a financial agent of the government to receive moneys, etc., subject to the control of the Secretary of the Treasury.\textsuperscript{32}

While it appears startling at first sight for the government to start an insurance company it is well settled, that once given a power, Congress may choose any appropriate means for exercising that power even by setting up a corporation and going into a field ordinarily thought of as a purely private one.\textsuperscript{33} This proposition is brought nearer home when we consider, for instance, the insurance for shipping during the World War; \textsuperscript{34} insurance for cooperatives under the Agricultural Marketing Act; \textsuperscript{35} insurance for men in service during the World War; \textsuperscript{36} insurance in modernization and house loans; \textsuperscript{37} and the insurance of bank deposits.\textsuperscript{38}

Nor is it particularly important to determine whether or not the activities of the agency set up to exercise the power result in competition with private business.\textsuperscript{39} Injuries to individuals by way of competition by an agency exercising a valid power do not lessen the right to its exercise, and the loss of the individuals is considered the inevitable price of living in an organized society.

Among the heads of congressional power suggesting themselves are:

\textit{The Money-Spending Power}

The Constitution gives Congress very wide spending powers to provide for the \textit{general welfare}.\textsuperscript{40} Under this power loans and gifts have been made to farmers totaling for the past ten years over $600,000,000.\textsuperscript{41} It is urged by proponents of the present bill that the crop insurance there outlined will relieve the federal government of a great portion of this burden and that the Corporation will be practically self-sustaining except for the ad-

\textsuperscript{30} Id. at § 3(a), (b).
\textsuperscript{31} Id. at § 15.
\textsuperscript{32} Id. at § 11.
\textsuperscript{33} McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579 (1819).
\textsuperscript{34} 38 Stat. 711 (1936).
\textsuperscript{39} Anderson v. Dunn, 6 Wheat. 204, 5 L. ed. 242 (1821).
\textsuperscript{40} U. S. Const. Art. I, § 8.
\textsuperscript{41} H. R. Doc. No. 150, 75th Cong., 1st Sess. (1937).
ministerial expenses which are to be kept up by the government through the above-mentioned annual appropriations. These authorized amounts, together with the initial sum made available to the Corporation are part of an organized money-spending program for the welfare of the farmers. It is further urged that a program under this money-spending power of Congress should be no less valid because organized so as to require a minimum expenditure to carry it out. Of course the organization and carrying out of the program themselves may be attacked. For example, the appropriations used in setting up the AAA were undoubtedly under this money-spending clause but that did not save an otherwise unconstitutional scheme.

In this connection it is to be noted that the purposes and program condemned in the AAA case were entirely unlike those of the present plan. The insurance bill proposes directly to assure a definite sized crop to a participant and indirectly to maintain a wheat surplus in storage. This storage serves to equalize the wheat market by removing surplus in good crop years through collection of premiums, and then to distribute this store by way of indemnities in bad years. Another effect of the storage is to keep a large amount of wheat as an emergency food store for the country. No apparent effort is made in the bill to control production of wheat, so that unless administered with that end in view it would appear free from that particular objection.

It appears that the stretching of the money-spending power to legalize whatever subjects Congress chooses as the objectives of its bounty is an invalid exercise of the broad power to "appropriate . . . for the general welfare". Every condemned Congressional invasion of state or private rights which involved federal administration was accompanied by an appropriation to carry it out, but this did not save it. Unlike relief money and unlike donations made, for example, to state universities to establish certain courses of instruction, or gifts to maternity hospitals, the money appropriated in the instant case is for the purpose of initiating a continuing program. It does not end with the appro-

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42 S. 1397, 75th Cong., 1st Sess. (1937), § 15.
43 Id. at § 3.
45 Ibid.
46 The report of the President's Committee (cited supra n. 3) suggested that a test of a farmer as a risk might include his participation or non-participation in programs of adjustment and soil conservation or equivalent practices. Compare with the economic compulsion condemned in AAA case cited supra, n. 44.
priation and hence may be open to objection if the program which it makes possible is unauthorized. In cases of outright appropriation for the purpose of gifts no one can show injury and hence the exercise of the money spending power is not subject to attack.47

The Power to Borrow Money

Congress has power to borrow money on the credit of the United States.48 That this power includes also some implied powers is settled.49 It may well be that a measure that effected a strengthening of the credit of the United States could be brought within a power implied in this provision to use the credit. The present bill raises this question in the following manner: In past years the national government has made extensive loans to farmers on no other collateral in many cases than the future crops of the borrowers. A series of bad crop years causes the borrowers to lose their equities in farms and causes a total failure of the collateral for the loans. This collateral is to be considered a part of the substance of the United States upon which its credit depends so that when it is lost there is that much less on which to base future credit. The insurance plan is devised to stabilise the incomes of these borrowers so that they will not lose their farms, and in this way, to keep alive the promise of future crops constituting the collateral.

Another aspect shows the insurance plan as one to reduce the necessity for borrowing on the credit of the United States to meet relief needs. As noted above, over $600,000,000 has been spent on farmers in various ways in the past few years, due largely to lack of a reasonable farm income in years of unavoidable crop failures. If, then, they can be assured of an income to the extent of their participation, the relief demands on the federal government should be reduced. These demands have been met by money raised largely on the credit of the United States and in part by additional taxation. It would appear that any measure calculated to reduce the drain on the credit of the United States should be held valid if possible, if some clear right of the states or the people would not be invaded by such a holding.

Here again it is a matter of experience that the purpose of an act of Congress does not justify the adoption of an unconstitu-

tional means. The AAA sought to put farming on a firmer basis by controlling production. The intended result was to put the same farmers here considered on a more substantial economic footing. In the AAA situation the argument could have been advanced that the AAA would place debtors of the United States on a better financial basis and so strengthen the chances of the United States to collect its debts.

The Commerce Clause

Under the Commerce clause Congress has power to regulate interstate traffic.50 At a glance this clause appears of no assistance to this act. In the first place, the insurance business repeatedly has been held not to involve an interstate commerce,51 and in the second place, agriculture has been held to be a local business.52

The nature of the particular plan involved in the present bill does not, however, amount to a strict insurance business. Insurance is usually considered to involve a money indemnity for a loss based on a risk determinable and accidental as to the insured.53 Money premiums are paid in an amount equal to the risk, based on the law of averages plus operating expenses of the insurer. Under the proposed act premiums are to be paid in kind, or cash sufficient to enable the insurer to buy an equivalent of the premium for the crop insured. The size of the premium does not take into account operating expenses, these being borne by the United States. Indemnity is paid in kind or the amount due on a claim may be sold and the cash paid to the insured.

The business of shipping and storing grain, as distinguished from the business of raising the crop, has been held to be interstate commerce and subject to federal control.54 In crop insurance, premium grain is shipped to the storage place of the insurer, is held there as a common fund, and is finally shipped to the insured as indemnity or sold for him. These activities either involve interstate commerce directly, or they contemplate interstate com-


52 United States v. Butler, 297 U. S. 1 (1936), cited supra, n. 44.

53 People ex rel. Kasson v. Rose, 174 Ill. 310, 51 N. E. 246 (1898).

merce. In any event the stored grain is designed eventually to reach the markets of the country and the world, and in this way to flow in interstate commerce. Grain is to be sold and replaced from time to time to prevent deterioration, and this transaction will involve putting grain in interstate commerce and taking other grain temporarily out of interstate flow. Such a plan, if carried out by a private insurance company, would unquestionably be subject to strict control by the federal government. In addition to this, if a private company were to go into such a project, it would accumulate and have at its disposal a store of grain of such size that the possibility of its being put suddenly on the market would demoralize the grain market. The thought that the private company owning such a stock of grain might, through failure or other cause, dump it all on the market would undoubtedly depress prices, while the actual dumping of this grain would destroy the market and bring ruin on many engaged in raising, handling or marketing. The public interest, particularly, in a commodity of such importance to the nation's food supply would demand protection against such a contingency. In view of this and in view of the great difficulty of adequate supervision to prevent abuse in this interstate commerce, Congress may be said to have determined that the only satisfactory, or the most satisfactory, method of procedure is to take over the business itself.\(^\text{55}\)

The plan proposed does not involve government

55 In North Dakota-Montana Wheat Growers Association v. United States, 66 F. (2d) 573, 578 (C. C. A. 8th, 1933), cert. denied, 291 U. S. 672 (1934), the Court said:

"It is a matter of common knowledge that when the Agricultural Marketing Act was passed agriculture was in a depressed condition. The government was seeking a way to increase prices of farm products in order to stimulate production and thus protect the food supply of the nation. If the taking over and operating of the railroad systems of the country was an act in the sovereign capacity of the government, E. I. DuPont de Nemours & Co. v. Davis, Director General of Railroads, 264 U. S. 456, 44 S. Ct. 364, 68 L. Ed. 788 (1924); Mellon, Director General v. Michigan Trust Co., 271 U. S. 236, 46 S. Ct. 511, 70 L. Ed. 924 (1926), and if the operation of ships by the Fleet Corporation was performing a function of government, Emergency Fleet Corporation v. Western Union Telegraph Co., 275 U. S. 415, 48 S. Ct. 198, 72 L. Ed. 345 (1928); The Messenger 14 F. (2d) 147 (S. D. Tex. 1926); United States v. Porto Rico Fruit Union, 12 F. (2d) 961 (C. C. A. 1st, 1926); United States v. Skinner & Eddy Corp., 28 F. (2d) 373 (1928), it would seem that the protection of the food supply of the nation and the stimulation of agriculture were fully as much a sovereign function of government. The first section of the Agricultural Marketing Act, 46 Stat. 11 (1929), 12 U. S. C. A. § 1141 (1934), discloses the policy of the act, which is to place the industry of agriculture on the basis of economic equality with
control of wheat production, shipping, storing or marketing, but only an insurance plan which includes shipping, storing and marketing of a very small percentage of the total wheat crop in a single year. The premiums will be collected for the most part in good crop years when the amount collected will be but a small fraction of the total yield, the value of which will be small in a good year when prices are low. Double protection against dumping of the stored wheat is furnished by limiting the powers of the Corporation and also by inserting a guarantee against it in each contract and giving the insured unlimited remedy by injunction or otherwise to prevent this contingency.

The Corporation will exert, by its activity and by reason of its supply of wheat, a stabilising effect on interstate commerce in that commodity. By this plan it will assure a minimum quantity of wheat available every year. Thus in a year of a bumper crop it will take some of it out of commerce and thus relieve it of the strain of a heavy low price traffic to some extent. In a lean year it will release to flow in interstate commerce the amount required to bring the low yield up to the insured amount. This will place in commerce a predetermined amount of relatively more valuable wheat. To the extent of participation in the plan, the interstate commerce in wheat is assured of a definite amount for every year. In this sense the Corporation may be looked upon as an instrumentality chosen by Congress to stabilise and control interstate commerce.

The Corporation is Constituted a Fiscal Agent of the United States

Congress has power to appoint financial agents to assist in administration of its various powers. The Corporation is put at the disposal of the Secretary of the Treasury as a depository of public money; it is also bound to perform reasonable duties as a financial agent of the government.56 The purpose of including this isolated function in the insurance plan is quite frankly admitted to be an attempt to bolster the bill from a constitutional angle.57 It will be remembered that the Federal Land Banks were sustained on the ground that they were fiscal agents of the government, and the Court refused to go into the question of the power

other industries, and to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and other food products—clearly an exercise of national sovereignty."

56 S. 1397, 75th Cong., 1st Sess. (1937), § 11.

57 Hearings before a Subcommittee of the Committee on Agriculture and Forestry on S. 1397, 75th Cong., 1st Sess. (1937).
to make loans, it being held to be an incidental function.\textsuperscript{58} In that same case it was urged that the Federal Land Banks were named fiscal agents merely as a pretext, but the Court held that as Congress had power to appoint such agents it did not lie with the Judiciary to investigate the motives or necessity behind the particular exercise of the power.

The extent to which a fiscal agent can validly engage in extragovernmental functions has not been defined. From the refusal of the courts to go beyond this power it may be that a fiscal agent has powers as broad, for instance, as those accorded the government in disposing of its property.\textsuperscript{59} It is worthy of note that the general insurance business of today includes as an ordinary function the giving of credit, lending money, receiving deposits, establishing trust funds and other financial services not strictly part of insurance. Insurance companies generally, therefore, are now well adapted as financial agents so that the appointment of the Crop Insurance Corporation as one of them is merely utilizing an aptitude developed in the insurance business.

\textit{The Fifth Amendment}

The conduct of this plan of crop insurance with its commercial phases above noted will probably conflict somewhat with vested property interests. Although at present no insurance company is engaged in writing all-risk insurance for crops, there are several companies writing hail and fire crop insurances, and it is conceivable that as to wheat these companies will suffer a loss of business. Also, incidental conflicts with grain storage operators and marketers will probably follow the plan.

Given a valid power, however, Congress may exercise it at the expense of injury to private business. This is well settled as a necessarily implied immunity in the execution of powers.\textsuperscript{60}

\footnote{\textsuperscript{58} Smith \textit{v.} Kansas City Title Co., 255 U. S. 180, 211 (1921).}

\footnote{\textsuperscript{59} Ashwander \textit{v.} Tennessee Valley Authority, 297 U. S. 288 (1936).}

\footnote{\textsuperscript{60} Anderson \textit{v.} Dunn, 6 Wheat. 204, 5 L. Ed. 242 (U. S. 1821); Ashwander \textit{v.} Tennessee Valley Authority, 297 U. S. 288 (1936).}
Conclusion

The strongest authority for the present proposal resides in the two-fold power of Congress, the express power to control interstate commerce, and the implied power to create fiscal agents. As exercises of either or both of these powers the plan may well be defended.61

61 This plan of insurance is advanced at present for wheat alone. The reasons for starting with one crop only is because of the experimental nature of the plan. One crop involves a smaller administrative problem and wheat is the best and most completely known crop at present. Statistics were at hand on which this first venture could be planned if wheat were chosen; otherwise, years of fact-collecting would be necessary. Eventually, if the present plan meets with success, it would be natural to apply it to other commodities, corn and cotton for instance. Obviously, the success of the present type of insurance depends upon the storage of the commodity, but some similar plan is expected to be worked up for fruits and the like.

R. J. M.
NOTES

ABOLITION OF ACTION FOR BREACH OF CONTRACT TO MARRY

Arising from the enactment of the so-called "heart-balm" laws in several states in the last few years is the question whether such laws contravene the due process clause of the Fourteenth Amendment to the Constitution of the United States, as well as similar clauses contained in the constitutions of the states. The answer is necessarily shrouded in considerable uncertainty, as is evidenced by the divergent views expressed by those who have weighed the problem. No case involving one of these statutes has yet been decided by the Supreme Court of the United States, but the New York Court of Appeals in its recent decision of Fearon v. Treanor, in a cautiously worded opinion upheld the right of the legislature to abolish a cause of action for breach of promise to marry. Judge Hubbs concluded his opinion: "We are convinced that the Legislature in passing the statute acted within its constitutional power to regulate the marriage relation for the public welfare. Realizing that the statute as a whole presents other constitutional questions, we confine our decision to the facts presented in this case." The court, obviously doubting the right of the legislature to abolish a cause of action on contracts generally, labored diligently to distinguish a contract to marry from ordinary contracts. Yet it cannot be denied that this decision does uphold the right of the legislature, under certain circumstances, to abolish common-law causes of action without providing substitutes therefor. A short time before this decision, the Appellate Division of the same court in the case of Hanzfarn v. Mark, an action for damages for alienation of affections and criminal conversation, held the statute unconstitutional. "The serious question in this case," said the court, "is whether the Legislature


2 Myers, Validity of Statutes Prohibiting Breach of Promise and Alienation of Affection Suits, (April, 1935).—OHIO L. REP.—The author concludes: "The rights and duties may be increased and enlarged from what they were at common-law, but to destroy an existing common-law right, or to take away all remedies for its enforcement, is to violate express provisions of both state and federal constitutions, so as to leave those provisions devoid of meaning and without proper safeguards. Hibschman, Can Legal Blackmail Be Legally Outlawed? (1935) 69 U. S. L. REV. 474. After a rather elaborate analysis of cases dealing with legislative attempts to alter or abolish common law causes of action the author concludes that they are protected from total legislative extinction both by the Fourteenth Amendment and by the due process and remedy-for-every-injury clauses of their respective state constitutions. Legis. (1936) 5 BROOKLYN L. REV. 196. The author argues that the damages in actions for alienation of affections, criminal conversation and breach of promise to marry are basically punitive and as such may be abolished by the legislature in the exercise of its police power. See also, Feinsinger, Legislative Attack on "Heart-Balm" (1935) 33 MICH. L. REV. 979; Brown, The Action for Alienation of Affections (1934) 82 PA. L. REV. 472; Note (1936) 30 ILL. L. REV. 764.

3 272 N. Y. 268, 5 N. E. (2d) 815 (1936).

4 Five members of the court concurred; Crane, C. J., concurred in the result.

5 Supra note 3, 5 N. E. (2d) at 817.

has power to abolish a common-law cause of action without providing in substitution therefor, some other adequate remedy.” The decision concludes: “The actions abolished existed at common-law, and, if important rights are involved, the Legislature is without power to abolish the action without providing a substitute. This it has not done and I can see no way to uphold the statute.” The doctrine enunciated in the last quotation finds support in the language of many Supreme Court decisions. “. . . the power to abolish remedies is subject to the condition that the Fourteenth Amendment guarantees to the citizen the preservation of his substantial rights to redress by some effective procedure,” 9 “. . . so long as a substantial and efficient remedy remains or is provided, due process of law is not denied by legislative changes.”

Attempts to Abolish Other Causes

Of course it may well be argued that the language of the courts, taken abstractly, without the facts to which it pertains, is of questionable value. In addition, the more technical scholar may pounce upon the language itself, and point out that the language quoted speaks of abolition of remedies, not abolition of causes of action. For that reason it seems necessary to point out the distinction between a right and a remedy. A remedy is nothing more than the means provided by law for the enforcement of rights, and is not of itself a right except that when there exists but a single remedy for the enforcement of a right, such remedy cannot be wholly taken away, without providing some other reasonably convenient and efficient means of enforcement. Failure to substitute some other remedy violates the Constitution, since a withdrawal of all legal means for the enforcement of a right is equivalent to a subversion of the right itself. But as pertaining to a mere remedy, there exists no doubt of legislative power to make such changes therein, as seem fit to the legislature, if in so doing it preserve or provide a reasonable means and opportunity for the full enjoyment of the right. It must be admitted that the dividing line between what is and what is not constitutional, under the police power of the state, is pricked out by gradual approach and contact of decisions on opposing sides. The Fourteenth Amendment does not prohibit states from forbidding a man to do things simply because he might do them at common law. The main requirement

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7 Id. 248 App. Div. at 326.
8 Id. at 330. The Court of Appeals, 272 N. Y. 671 (1936), affirmed without opinion the judgment of the Appellate Division.
10 Crane v. Hahlo, 253 U. S. 142, 147 (1922).
13 See Noble State Bank v. Haskell, 219 U. S. 105 (1911). Justice Holmes, in his characteristic fashion warns the court: “. . . we must be cautious about pressing the broad words of the Fourteenth Amendment to a dilly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees of the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the law making power.” Id. at 110.
of the due process clause of that Amendment is that the law shall be reasonable and not arbitrary, and that it shall operate equally upon all who come within its terms. If the law is intended to accomplish an object within the police power, and the provisions of the law have a real or substantial relation to the end aimed at, the law will be held valid. But if the intended object does not legitimately come within the police power, or the means adopted to accomplish a legitimate purpose are not appropriate to that end, the law will be held void. There is no well-defined norm by which the provisions of a statute may be accurately tested for reasonableness. However, an examination of the cases would seem to indicate that any statute that abolishes all remedy for injury to person or property leaving the injured party absolutely remediless is sufficiently unreasonable to contravene due process. The cases of New York Central R. R. v. White and Mountain Timber Co. v. Washington have been cited as authority for the proposition that the legislature may abolish causes of action and defenses existing at common law. These were cases involving the Workmen's Compensation Statutes, which, while they abolished causes of action, did not leave the injured party remediless; likewise in the Employers' Liability cases.

A group of cases which serves to cast some light on the point as to where the courts have drawn the line on the police power of the legislature embraces those growing out of legislative efforts to limit liability in libel cases, where the publication is made in good faith and a retraction is published when demanded by the libeled party. The statutes usually provide that in such cases the recovery shall be limited to actual damages. Such statutes have been held unconstitutional in Kansas, in New Jersey, in Ohio, and in Michigan. They have been upheld in Alabama, in Minnesota, and in North Carolina. It will be noted that even in those states holding such statutes unconstitutional the injured party was not left wholly without remedy. In Hanson v. Krehbiehl, it was said: "... the criticized act takes from the libeled person the right of remedy by due course of law for an injury suffered in his reputation." And in McGee v. Baumgartner: "... and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering for it. ... The right to recover in an action of libel, damages to reputation, cannot be abridged by statute."

15 See LONG, CASES ON CONSTITUTIONAL LAW (3d ed. 1936) 1069, n. 2.
16 243 U.S. 188 (1917).
17 243 U.S. 219 (1917).
19 In N.Y. Central R. R. v. White, 243 U.S. 188 (1917) it was held that the common law rules respecting the rights and liabilities of employer and employee in accident cases, viz., negligence, contributory negligence, assumption of risk and negligence of fellow servants, as rules defining legal duty and guiding future conduct, may be altered by state legislation and even set aside, at least if some reasonably just substitute be provided.
23 Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N. E. 917 (1911).
27 Osborn v. Leach, 135 N. C. 641, 47 S. E. 811 (1904).
28 68 Kan. 670, 75 Pac. 1041 (1904).
29 121 Mich. 287, 80 N. W. 21 (1899).
The court in Osborn v. Leach,\textsuperscript{28} which holds the libel statute constitutional, bottoms its decision on the distinction between punitive and compensatory damages. It points out that punitive damages are not included in what are termed actual or compensatory damages and the statute, upon the conditions therein specified, relieves and can relieve a defendant only against a claim for that particular kind of damages. They are awarded on grounds of public policy and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed to him in his suit. The right to have punitive damages is therefore not property. The court frankly concedes the right to recover damages for an injury to be a species of property, which vests in the injured party immediately on the commission of the wrong.\textsuperscript{30} Being property, it is concededly protected by the ordinary constitutional guarantees. This case goes so far as to say that those statutes which confine damages to actual damages and then define actual damages to be only direct pecuniary loss in certain specified ways and none other, would be unconstitutional in that they deny substantial relief.

Another group of cases pertinent to the present discussion are those involving the validity of the so-called automobile guest statutes, by which various states have sought, within recent years, to relieve the owner of an automobile of legal responsibility to a person injured while riding in his car as a guest. Such a statute was held unconstitutional in Delaware in the case of Coleman v. Rhodes.\textsuperscript{31} Then the legislature enacted a new statute limiting his liability to damages for intentional injuries or injuries caused by his wilful or wanton negligence. This second statute stood the judicial test of reasonableness and was accordingly declared constitutional in Hazard v. Alexander.\textsuperscript{32} A Connecticut statute similar to the second Delaware enactment was upheld in Silver v. Silver.\textsuperscript{33} And a statute similar to the first Delaware law was denied enforcement in Oregon.\textsuperscript{34} These cases develop a pattern showing the consistency of various state courts in testing the reasonableness of legislative enactments. The judicial axe is wielded not always when the legislative attempts to limit liability, but inexorably when it attempts to eliminate liability by fiat. The courts have consistently refused to concede that such legislation affords due process.

The statutes which have been considered in this discussion, \textit{i.e.}, Workmen's Compensation acts, Libel Liability statutes, and Automobile Guest statutes, all involve legislative attempts to alter or abolish common-law causes of action. In the light of the treatment they have received by the courts, it appears that the legislative power to deal with established remedies is subject to constitutional restrictions and that the courts look with unfriendly eyes upon any effort to abolish all remedies in a given case, when such abolition has the effect of leaving an injured party without redress. This is true not merely as to causes of action already accrued but also as to potential future causes. A vigorous pronouncement to this effect was made

\textsuperscript{28}135 N. C. 641, 47 S. E. 811 (1904).
\textsuperscript{29}But see Roberson v. Roberson, —Ark.—, 101 S. W. (2d) 961 (1937), holding constitutional a guest statute (which, however, saved a cause of action for one who was injured by the operation of the vehicle when it was "wilfully and wantonly operated in disregard of the rights of others").
\textsuperscript{31}35 Del. 120, 159 Atl. 649 (1932).
\textsuperscript{32}173 Atl. 517 (Del. Super. 1934).
\textsuperscript{33}108 Conn. 371, 143 Atl. 240 (1928), aff'd 280 U. S. 117 (1929).
\textsuperscript{34}Stewart v. Houk, 127 Ore. 589, 271 Pac. 998 (1928).
in *Eastman v. Clackemas County:*36 "Every man shall have remedy by
due course of law for injury done him in person, and property or reputa-
tion. . . . When the Constitution was framed and adopted it was and had
been the law of the land from comparatively early days that a person should
have an action for damages against a county for any injury caused by its
act or omission. If then, this known and accustomed remedy can be taken
away in the face of this Constitutional provision, what other may not? Can
the Legislature in some spasm of novel opinion, take away every man's
remedy for slander, assault and battery, or the recovery of a debt? And if
it cannot do so in such cases why can it in this?" A similar thought has
been effectively stated by Justice Miller in a New York case: "The plain-
tiff had the right [at common law] . . . That right has been violated, and,
if he can have no remedy for the injury resulting from such violation, it
seems to me we must revise, our notions respecting the security in life,
liberty, and property guaranteed us by the bill of rights."36

**Conclusions**

To determine the reasonableness of a statute some inquiry must be made
by the court to adjudge its appropriateness to the end sought. While courts
have consistently refrained from considering the wisdom of legislative enact-
ments, yet in determining whether a statute is reasonable or arbitrary
some attention must also be paid to its probable effects. This may be a
feathery distinction, but it has been deemed enough to justify the contentions
of the judges that they are not invading the exclusive legislative domain.
If it be conceded that a consideration of effects is within the judicial power,
one cannot escape the conviction that the enactments under consideration
will be ultimately decreed an unreasonable exercise of the state's police
power. And no statement by the legislature that "the best interest of the
people of the state will be served by the abolition of such remedies"37 will
make up for a lack of power in the legislature to pass such a statute. As
civilization emerged from barbarism, civil redress for injury took the place
of primitive force. Incorporated into the common law, this right of redress
is today one of the rights guaranteed by the Constitution. No abuse should
be enough to require abolition. That such abuses should be corrected no
one would wish to deny, but abolition is drastic correction indeed. If the
courts cannot check the abuses through their power over the litigation, then
the legislature must find some way short of abolition to regulate the action.

J. V. D. AND M. P. S.

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37 Declaration of public policy of state. "Remedies heretofore provided by law for
enforcement of actions based on alienation of affections, criminal conversation, seduc-
tion and breach of contract to marry, having been subjected to grave abuses, causing
extreme annoyances, embarrassment, humiliation and pecuniary damages to many per-
sons wholly innocent and free of any wrongdoing, who were merely the victims of cir-
cumstances, and such remedies having been exercised by unscrupulous persons for their
unjust enrichment, and such remedies having furnished vehicles for the commission or
attempted commission of crime and in many cases having resulted in the perpetration
of frauds, it is hereby declared as the public policy of the state that the best interest
of the people of the state will be served by the abolition of such remedies. Consequently,
in the public interest, the necessity for the enactment of this article is hereby declared
INCOME TAXATION OF GOVERNMENTAL EMPLOYEES

At this time, when governmental costs, state and federal, are rising and there is a consequent search for new sources of revenue, two recent Supreme Court decisions have the effect of exempting large groups of state and federal employees from income taxation. In New York ex rel Rogers v. Graves, the Supreme Court unanimously held that New York State cannot tax the salary of the general counsel to the Panama Railroad Company. In Brush v. Commissioner of Internal Revenue, it was decided that the chief engineer of the New York City water system is exempted from the federal income tax.

State Taxation of Federal Officers

In the case of Dobbins v. Commissioners, the Supreme Court held that the captain of a United States revenue cutter was exempted from a Pennsylvania county excise tax levied without discrimination. The Court in the Dobbins case based its decision on McCulloch v. Maryland and Weston v. Charleston. It will be remembered that in the McCulloch case, the State of Maryland had attempted to lay a discriminatory tax on the operation of an United States bank. The tax was, of course, held bad. In the course of this

1It was estimated that approximately 4,891,000 persons were employed in 1935 by the several states and municipalities; Brief for Appellees in Brush v. Commissioner, U. S. —, 81 L. ed. 443 (1937). It has been further estimated that the number of federal employees is approximately 1,051,607. 81 Cong. Rec., April 12, 1937, at 4341.
3Supra, note 1.
4Justices Roberts and Brandeis dissented. Justices Cardozo and Stone concurred in the majority view on the ground that the petitioner had brought himself within the exemption as set forth in the Treasury Regulations. Article 643 of Treasury Regulations 74 reads as follows: "Compensation of State officers and employees—Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision, and (b) the services are rendered in connection with the exercise of an essential governmental function. The commissions of receivers appointed by State courts are subject to tax for 1928 and subsequent taxable years."
5Section 22 relating to gross income, of the Revenue Act of 1928, c. 852, 45 Stat. 791, defines "gross income" as follows: "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid.
74 Wheat. 316 (U. S. 1819).
82 Pet. 449 (U. S. 1829).
9Accord: Osborn v. Bank of U. S., 9 Wheat. 738 (U. S. 1824) (State officers enjoined from enforcing the collection of the taxes.) It is to be remembered that Chief Justice Marshall's remarks in the McCulloch case were directed at the states and he specifically excluded the National Government.
10"It has also been insisted, that, as the power of taxation in the general and State governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the States, will equally sustain the rights of the States to tax banks chartered by the general government."
11"But the two cases are not on the same reason. The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the government of the United States, it acts
opinion Chief Justice Marshall uttered his famous dictum that the power to tax is the power to destroy. In the Weston case, Chief Justice Marshall decided that a non-discriminatory tax on income was invalid insofar as the interest from United States bonds was concerned, on the ground that the tax would hinder the federal government in borrowing funds.

Judging from the dearth of litigation, presumably the various state governments have assumed that the Dobbins case stands for the proposition that all federal officers and employees are immune from state taxation on income. In the few instances in which the question has come up, the courts have followed the Dobbins case. In State ex rel Thompson v. Truman it was held that a receiver appointed by a federal court was a federal officer, and as such, was not subject to a state income tax on the ground that the reduction of compensation would make for an interference with the operations of the federal court. In Schlosser v. Welsh, the federal court held that a postal clerk, a regional attorney for the Veterans Administration, and a stockman upon an Indian reservation, were exempted from the South Dakota income tax.

In the Rogers case, the State of New York attempted to draw a distinction between the tax exemption of persons employed directly by the United States Government and persons employed by instrumentalities of the United States Government. The Supreme Court refused to draw this distinction. Mr. Justice Sutherland stated that: "The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune." 

Although the railroad company is wholly owned and operated by the Federal Government in connection with the Panama Canal, the State of New York claimed that it was partly engaged in private functions. But the Court pointed out that this did not alter the situation, saying: "We attach no importance to the fact that the railroad company has utilized both its ships and railroad to carry private freight and passengers. The record shows that this is done to a limited extent compared with the government business; and that it is only incidental to the governmental operations. The primary purpose of the enterprise being legitimately governmental, its incidental use upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme." Supra, note 6 at 435.

9 Supra, note 6, at 430.
10 It has been held, however, that an inheritance tax on United States bonds is valid on the ground that there is no impairment of the federal borrowing power since the tax is levied on the right of succession to property, not on the property itself. Plummer v. Cole, 178 U. S. 115 (1900); Blodgett v. Silberman, 277 U. S. 1 (1928).
11 Notes (1921) 11 A. L. R. 532; (1923) 22 A. L. R. 293; (1933) 82 A. L. R. 989.
12 319 Mo. 423, 4 S. W. (2d) 433 (1928); cf. People ex rel. Smyth v. Lynch, 254 N. Y. 427, 173 N. E. 571 (1930), re-argument denied, 255 N. Y. 629, 175 N. E. 344 (1931). The New York court held that the manager of a subsidiary corporation organized by the United States Shipping Board was subject to the New York income tax. The court proceeded on the theory that the human agents of the subsidiary corporation were not government employees because the independent corporation intervened.
14 Supra, note 2, at 206.
for private purposes affords no ground for objection. *United States v. Chandler-Dunbar Co.*, 229 U. S. 53; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 333. The first of these two cases dealt with the disposition of excess water power developed by a project to improve navigation; and the second with the disposition of surplus electric energy developed by a like project. But the principle is equally applicable to the situation here."  

**Federal Taxation of State Officers**

The leading case in this field is *Collector v. Day*. 16 It was there held that a Massachusetts probate judge was exempt from the Civil War income tax levies. Mr. Justice Nelson, no doubt with Marshall's famous dictum in mind, stated that "... the means and instrumentalities employed for carrying on the operations of the governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government." 17 (Italics supplied.)

The next case to be considered is *Helvering v. Powers*. 18 In that case the trustees of the Boston Elevated Railway claimed exemption from the federal income taxes. The trustees were operating a privately owned railway for the state under a temporary statutory agreement. Although the trustees were paid by the company, the opinion of the Court assumes that they were officers of the Commonwealth of Massachusetts. It was decided, however, that they are not exempt from taxation because the operation of a street railway was deemed not to be a usual governmental function. In other words, the state function in this regard was deemed proprietary, and, therefore, the principle of immunity of taxation did not apply. 19

The so-called "governmental-proprietary" test had its inception in the case of *South Carolina v. United States*. 20 It was there decided that agents

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16 *Supra*, note 2, at 206. It will be noted that here, in dealing with the activities of the Federal Government, the court did not apply the so-called "sovereign-proprietary" test which has been applied in dealing with the activities of the states. See discussion, *infra*, under Federal Taxation of State Employees. An interesting Court of Claims case in this connection is *Alabama v. United States*, 38 F. (2d) 897 (Ct. Cl. 1930). The State of Alabama levied a license or privilege tax on all those engaged in the business of manufacturing and selling hydro-electric power. The Court of Claims held that although the United States was generating and selling power at Muscle Shoals it was exempt from tax. Alabama urged that this was a proprietary function of the government but the Court of Claims ruled that the United States cannot constitutionally have any proprietary power since the Federal Government is one of delegated powers and does not have any reserved powers of sovereignty. See Stokes, *State Taxation and the New Federal Instrumentalities* (1936) 22 Iowa L. Rev. 39.

17 *Supra*, note 16, at 125.

18 293 U. S. 214 (1934).

19 *Helvering v. Powers* would seemingly overrule a previous federal decision holding that an employee of a street railway owned and operated by the City of Detroit was tax exempt. *Frey v. Woodworth*, 2 F. (2d) 725 (E. D. Mich. 1924); dismissed in the Supreme Court on motion of the Solicitor General, 270 U. S. 699 (1926). See also City of Seattle v. Poe, 4 F. (2d) 276 (W. D. Washington 1925), wherein the court refused to enjoin the collection of income taxes from employees of street railways because there was no express statutory exemption, nor had there been a final and authoritative determination of their exemption. The Frey case, *supra*, decided in the previous year by the district court was not deemed such an authoritative determination.

20 199 U. S. 437 (1905).
of the state liquor dispensary system were subject to the federal excise tax on liquor dealers. Mr. Justice Brewer pointed to the increase of state governments in business, and remarked that if the states chose to engage in all businesses then there would be no field for federal revenue. In order to curb immunity from federal taxation therefore, he seized upon the distinction between governmental functions and proprietary functions which had become established in those cases dealing with the liability of municipal corporations for the torts of their employees. After citing numerous tort cases, the Court said: "Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a state in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a state engages in a business which is of a private nature that business is not withdrawn from the taxing power of the nation."  

Later cases in the Supreme Court have adhered to this "test". In Flint v. Stone Tracy Co. it was held that the public service companies involved were not exempt from the corporation excise tax. Mr. Justice Day stated: "It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and, though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private corporations, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred. The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character."  

In United States v. California, it was suggested that only those functions in which the states traditionally engaged were exempt from federal taxation.  

In the Brush case Mr. Justice Sutherland adverted to these previous cases and their differing phraseology and stated that the words "essential", "usual" and "traditional" should not be "too literally contradistinguished". He then said: "In neither of the cases cited, was the adjective used as an exclusive or rigid delimitation. For present purposes, however, we shall inquire whether the activity here in question constitutes an essential governmental function within the proper meaning of that term; and in that view decide the case."  

21 Salt Lake City v. Hollister, 118 U. S. 256 (1886) seem to be.
22 In the field of torts this artificial distinction was made necessary by the archaic notion that one could not sue the sovereign without its consent. This technicality was surmounted by terming the governmental action proprietary, not sovereign. See Borchard, Government Liability in Tort (1925) 34 Yale L. J. 1, 129, 229.
23 Supra, note 20, at 463.
25 Id. at 172.
26 297 U. S. 175 (1936).
26a Supra, note 1, at 445.
After a careful review of all the local conditions, which established the necessity for an adequate and dependable supply of pure and wholesome water, it was decided that New York City was acting in the exercise of its essential governmental functions. It would seem that this case in fact substitutes a realistic approach to the problem of what is a governmental function for the historical approach in previous cases. Mr. Justice Sutherland stated that "governmental functions are not to be regarded as non-existent because they are held in abeyance or because they lie dormant, for a time. If they be by nature governmental, they are none the less so because the use of them has had a recent beginning." To repeat, whether "they be by nature governmental" would seem to depend upon a consideration of

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27 In Flint v. Stone Tracy Co., supra, note 24, at 172, Mr. Justice Day remarked by way of dictum that "... It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water, and the like". In the Brush case Mr. Justice Sutherland stated: "The contention is made that our decisions in South Carolina v. United States, 199 U. S. 437, 461, 462, and Flint v. Stone Tracy Co., 220 U. S. 107, 172, are to the effect that the supplying of water is not a governmental function; but in neither case was that question in issue, and what was said by the court was wholly unnecessary to the disposition of the cases and merely by way of illustration." supra, note 1, at 461. It is to be noted, however, that Heilinger v. Powers, supra, note 18, explicitly affirmed that part of the dictum dealing with transportation.

28 It is to be noted that the rule in tort cases, without exception, is that maintenance of waterworks is a proprietary function. The Court adverted to this fact but pointed out that the considerations in taxation cases were different than in tort cases. In the following tort cases it has been held that operation of waterworks constitutes a proprietary function: City of Prescott v. Sumida, 30 Ariz. 347, 247 Pac. 122 (1926); Hourigan v. Norwich, 77 Conn. 358, 59 Atl. 487 (1904); Augusta v. Mackey, 113 Ga. 64, 48 S. E. 339 (1901); City of Huntington v. Morgan, 87 Ind. App. 603, 162 N. E. 255 (1928); Miller Grocery Co. v. Des Moines, 195 Iowa 1310, 192 N. W. 306 (1923); Flintmus v. City of Newport, 175 Ky. 817, 194 S. W. 1639 (1917); Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871 (1899); French v. City of New Ulm, 130 Minn. 41, 153 N. W. 121 (1915); Dammann v. City of St. Louis, 152 Mo. 186, 53 S. W. 932 (1899); Campbell v. City of Helena, 92 Mont. 366, 16 P. (2d) 1 (1932); Munick v. City of Durham, 181 N. C. 188, 106 S. E. 665 (1921); Rhobidas v. Concord, 70 N. H. 90, 47 Atl. 82 (1900); Oakes Mfg. Co. v. City of N. Y., 206 N. Y. 221, 99 N. E. 540 (1912); Bailey v. City of N. Y., 3 Hill 551 (N. Y. 1842); Oklahoma City v. Hoke, 75 Okla. 211, 152 Pac. 692 (1919); Esberg-Dunst Cigar Co. v. Portland, 34 Ore. 282, 55 Pac. 961 (1899); Armstrong & Latta v. City of Philadelphia, 249 Pa. 39, 94 Atl. 455 (1915); City of Wichita Falls v. Lipscomb, 50 S. W. (2d) 867 (Tex. App. 1932); Egelhoff v. Ogden City, 71 Utah 511, 267 Pac. 1011 (1928); Stansbury v. City of Richmond, 116 Va. 205, 81 S. E. 26 (1914); Morgan v. Village of Stowe, 92 Vt. 338, 104 Atl. 339 (1918); Wigal v. City of Parkersburg, 74 W. Va. 25, 81 S. E. 554 (1914).

The Brush case overrules two lower court cases in which it was held that even for purposes of the federal income tax law, operation of a waterworks is a proprietary function. In Blair v. Byers, 35 F. (2d) 326 (C. C. A. 8th, 1929), involving the taxability of a special counsel employed by a board of waterworks trustees, it was decided that waterworks constitute a proprietary function. The decision, however, might well have been wholly on the ground that the petitioner was an independent contractor, since he kept up his law practice, as well as acting as counsel to the board.

In Denman v. Comm'r, 73 F. (2d) 193 (C. C. A. 8th, 1934) it was held that the manager of a city waterworks was subject to the federal income tax on the ground that waterworks constituted a private function, citing the Byers case, supra. In this connection, the Court stated: 'We have not failed to give careful consideration to Blair v. Byers, 35 F. (2d) 326, and Denman v. Comm'r Int. Rev., 73 F. (2d) 193, both of which take a view contrary to that which we have expressed. To the extent of this conflict, those cases are disapproved. Both rely on South Carolina v. United States and Flint v. Stone Tracy Co., supra, which we have already distinguished." See also T. P. Wittschen, 25 B. T. A. 46 (1931); Edward J. Miller, 28 B. T. A. 229 (1933).
all the facts in the case, not whether the function is "traditional" or "usual".29

Having established that the activity in question was governmental, it was assumed as a necessary corollary that fixed compensation paid to the officers and employees who are acting in their official capacity is immune.30 In so holding the court seemingly has departed from one artificial approach only to indulge in another. It will be noted that in previous tax cases the so-called "sovereign-proprietary" test was set up to prevent a curtailment of federal revenues, which would result from a mechanical application of the rule in Collector v. Day 31 and Dobbins v. Commissioners32 to the effect that one sovereignty cannot tax the incomes of agents and employees of the other.33

In recent years it had been thought that the Supreme Court was discarding somewhat the rule of total lack of power to tax, and was substituting therefore an inquiry into the amount of interference engendered by the tax.34

29 It has been suggested that the test of sovereign conduct for the purpose of immunity from taxation be the same as in taxation and eminent domain cases. If the state can expend public funds and condemn land to carry on a certain function, then it follows that the function is governmental. Cohen and Dayton, Federal Taxation of State Activities and State Taxation of Federal Activities (1925), 34 Yale L. J. 807, 822. If taken on logical grounds alone there would seem to be no objection to this suggestion. It would seem obvious that if the sovereign powers of taxation and eminent domain can be used to further a valid function of government, by definition that activity is governmental. But it must be realized that the courts have expressly stated that certain activities may be governmental insofar as taxation and eminent domain are concerned and yet not be immune from taxation by another sovereignty. In Flint v. Stone Tracy it was pointed out that the public service companies were exercising the power of eminent domain and yet were deemed private for purposes of taxation. Supra, note 24 at 172.

In Helvering v. Powers it was stated by the Chief Justice that "... the fact that the state has power to undertake such enterprises and that they are undertaken for what the state conceives to be the public benefit, does not establish immunity." See supra note 18 at 225. This statement was paraphrased with approval by Mr. Justice Sutherland in the Brush case, yet it can hardly be squared with his approach to what constitutes a governmental function. All the facts adduced by the Court simply establish the existence of public benefit in having an adequate water supply. It is also to be noted that in order to demonstrate that the field of governmental functions can grow, the Court pointed to cases involving eminent domain proceedings. In one of these it was held that a water supply in some instances might be of such public importance that a statute authorizing one man to condemn another's land for a water way was constitutional. Clark v. Nash, 198 U. S. 361 (1905). In another case condemnation of land for a park in the District of Columbia was upheld. Shoemaker v. United States, 147 U. S. 282 (1893). See also Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685 (1896); Rindge v. Los Angeles, 282 U. S. 700 (1923).

31 Supra, note 16.
32 Supra, note 5.
33 The purpose of the distinction between sovereign and private activities laid down in the South Carolina case becomes more apparent when it is noted that although the Supreme Court denominated the liquor business a proprietary function for purposes of taxation, yet for purposes of state immunity from suit without consent under the Eleventh Amendment, it was held to be a sovereign activity. Murray v. Wilson Distilling Company, 213 U. S. 151 (1909).
34 "Though the course of a century has not brought unanimity to the Court it has seen this doctrine relating to the immunity of governmental instrumentalities evolve from a 'total failure' of power into an inquiry whether the exercise of the power produces 'undue interference.' The 'total failure' stage belongs to the period when the Constitution was construed on the theory that the nation and the states were potentially (if not actually) hostile sovereignties. The 'undue interference' stage belongs to a period of assumed friendly relations and common purposes, when cases are
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\[35\] 1937] NOTES 1019

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any substantial manner the ability of plaintiffs-in-error to discharge their obligations to the State or the ability of a state or its subdivisions to procure the services of private individuals to aid them in their undertaking."  

The majority in the Brush case did not purport to determine the amount of interference. Tax exemption was assumed as a necessary corollary.  

Conclusion  

The net effect of these cases seems to be that millions of government employees whose work does not differ in any manner from that performed by private employees are exempt from income taxation. This situation imposes a burden on the government levying the tax and seemingly does not result in any substantial benefit to the government for whose theoretical advantage the immunity is invoked.  

Manifestly, the various state and federal governments faced with the increasing cost of social legislation will make some attempt to corral these exempted sources of revenue.  

One of the most obvious methods available would be by amendment of the Federal Constitution. The present session of Congress has witnessed the introduction of two resolutions seeking such an amendment. On April 2, 1937, Senator Capper introduced Senate Joint Resolution 122. This proposed amendment would empower non-discriminatory taxation of the securities of officers and employees of the state and federal governments. On April 12, 1937, Mr. Cochran introduced House Joint Resolution 320 which would empower non-discriminatory taxation of the governmental officers and employees.

Ment officer even though the society funds were derived from the city, as well as from private donors); Ogilvie v. Comm'r, 36 F. (2d) 473 (C. C. A. 6th, 1929) (Officer of privately endowed educational institution appointed by the governor of the state deemed not to be an employee of the State); Bew v. United States, 35 F. (2d) 977 (Ct. Cl. 1929) cert. denied, 281 U. S. 750 (1930) (Pilot whose income was regulated by state law and who was licensed by the state held not an employee of the state.)  

Supra, note 35 at 526. Mr. Justice Roberts, dissenting in the Brush case, supra, note 3, at 492, stated: "The petitioners seek to show the reality of the supposed burden by the suggestion that if his salary and the compensation of others employed by the city is subject to federal income tax, the municipality will be compelled to pay higher salaries in order to obtain the services of such persons and the consequent aggregate increase in outlay will entail a heavy financial loan. We know, however, that professional services are offered in the industrial and business field; and that while there is no hard and fast standard of compensation, and men bargain for their rewards, salaries do bear some relation to experience and ability. There is a market in which a professional man offers his services and municipalities are bidders in that market. We know further that those in private employment holding positions comparable to that of the petitioners pay a tax equal to that levied upon him. It is clear that any consideration of the petitioners' immunity from federal income tax would be altogether remote, impalpable and unascertainable in influencing him to accept a position under the municipality rather than under a private employer."  

Mr. Justice Stone, dissenting, in Indian Motocycle Co. v. United States, 283 U. S. 570, 580 (1931). It may be that a distinction should be drawn between the taxation of governmental officers who occupy positions peculiarly governmental, for example, a judge or police officer—and other governmental agents whose work differs in no wise from that performed in private business, for example, engineers, lawyers, clerks, etc. Cf. Mr. Justice Roberts, dissenting in the Brush case.  

It was thought in many quarters that the Sixteenth Amendment would empower the Federal Government to tax income from whatever sources derived. See discussion in Magill, Tax Exemption of State Employees (1928) 35 Yale L. J. 956. The Supreme Court has ruled, however, that the Sixteenth Amendment does not extend the taxing power, but merely precludes inquiry into the source of income for purposes of apportionment. Evans v. Gore, 253 U. S. 245 (1920).
It may be that the state governments could be induced to waive the immunity in their favor in return for a similar waiver by the Federal Government. It has been held valid for the Federal Government to allow state taxation of federal instrumentalities in many instances.40

But the easiest way out of the present inequitable situation would be for the Supreme Court to rationalize the cases and restate its position in terms of actual interference with governmental functions. Perhaps in some future case the Supreme Court will adopt the views of Mr. Justice Roberts, dissenting in the Brush case. He stated: "It seems to me that the reciprocal rights and immunities of the national and state government may be safeguarded by the observance of two limitations upon their respective powers of taxation. These are that the exactions of the one must not discriminate against the means and instrumentalities of the other and must not directly burden the operations of that other. To state these canons otherwise: an exaction by either government which hits the means or instrumentalities of the other infringes the principle of immunity if it discriminates against them and in favor of private citizens or if the burden of the tax be palpable and direct rather than hypothetic and remote." 41

A. B. S.

RENTS AND PROFITS FROM THE SALE OF PROPERTY USED OR HELD FOR RENTAL PURPOSES AS TAXABLE INCOME

Our revenue laws provide that an income tax shall be imposed upon the net income of all individual citizens of the United States.1 This net income is to be determined by subtracting allowable deductions from the gross income. Since gross income includes any gain, profit, or income derived from (among other items) rent,2 the question arises as to what deductions may be allowed to persons or corporations necessarily involved in the leasing of real property or the selling of property leased or held for lease prior to sale. Consideration of the question might proceed upon an analysis breaking the question down into subdivisions having as their basis (1) the use of the property, whether for business or personal purposes, and (2) the position of the taxpayer, whether lessor or lessee.

I. Property Used for Business Purposes

(A) Taxable Income

All amounts which are received by or accrue to the lessor as rents or royalties in payment for the use of property by the lessee shall be included as gross income.3 Rent which is not yet due or accrued but which the landlord requires to be deposited in advance is to be reported when due under

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41 Supra, note 3, at 452.


2 49 Stat. 1637, 26 U. S. C. A. § 22 (Supp. 1936); Reg. 94, Art. 22(a) 1.

the particular rental agreement. The Board of Tax Appeals has held that a lump sum paid by the lessee to the lessor as rent, for a term of nine hundred and ninety-nine years constitutes income in the year in which it was received.\textsuperscript{4} In \textit{Gates v. Helvering, Comm'r of Internal Revenue,}\textsuperscript{5} the lessor received $100,000 in cash and $86,000 in four notes due in one, two, three, and four years under a contract calling for annual rental, which the Treasury termed a lease. The Court held that the $100,000 was taxable in the year received but the amount of the note must be reported in the year in which such notes matured and were paid.

If a lessee erects a building or improves the leased property in accord with an agreement with the lessor, the lessor must report such income,\textsuperscript{6} (it being understood that the lessor becomes entitled to such improvements at the end of the lease) in one of three ways: \textsuperscript{7} (1) The lessor may report as income for the taxable year in which such buildings or improvements are completed their fair market value at the time of their completion; (2) The lessor may report as income in the year the buildings or improvements are completed the entire fair market value of such buildings or improvements, with adjustment for depreciation, expenses, etc., over the term of the lease; (3) The lessor may spread over the life of the lease the estimated value (taking into account depreciation over the term of the lease) of such buildings or improvements at the end of the lease with a portion reported as income each year.

The true test by which to determine whether or not a receipt of property constitutes income is not so much the nature of the property or the use to which it is put, but rather the nature of the transaction in which it is received. A receipt of property as rent is income, whether the receipt is of cash, chattels, or realty. Where the lessee is obliged to erect the building as part payment for the use of the land it is plain that the lessor receives the building (subject of course to the lease) as rent which is taxable income. If on the other hand the lessee erects a building voluntarily the lessor will likewise take the property with the improvement at the end of the term, but the value of the improvement cannot be considered rent.\textsuperscript{8}

Both the Board of Tax Appeals and the courts have found it difficult to come to any substantial agreement as to the precise time when income is realized by the lessor as a result of improvements made to the leased property by the lessee. The outstanding case in point is \textit{Hewitt Realty Co. v. Commissioner of Int. Rev.},\textsuperscript{9} in which the Court held that the regulation U. S. Treas. Reg. 74 Art. 63, (which provided (a) that the lessor might report as income at the time when such buildings or improvements were completed

\textsuperscript{4} Michigan Central Railroad Co., 28 B. T. A. 437 (1933). In this case the lessor recorded on its books the sum received as income for the year in question. It would appear that such a transaction is more in the nature of a sale than a lease. A better view might be to apportion the sum received over the life of the lease.

\textsuperscript{5} 69 F. (2d) 277 (C. C. A. 8th, 1934).

\textsuperscript{6} Permanent improvements made under a contract in addition to the yearly rent paid by the lessee constitute income to the lessor. Treasury Decision 2135.

\textsuperscript{7} Reg. 94, Art. 22 (a) 13.

\textsuperscript{8} Pembroke v. Helvering, 70 F. (2d) 850 (App. D. C. 1934).

\textsuperscript{9} 76 F. (2d) 880 (C. C. A. 2d, 1935) ; reversing 29 B. T. A. 1205 (1934). In this case the lessor leased land for twenty-one years, granting option to renew on same rental basis for three like terms contingent upon lessee's erecting a new building, title of which was to vest in the lessor. The lessee completed the building and the lessor having failed to report any income from this source, the Commissioner added $10,000 to the lessor's income in accordance with the statute.
the fair market value of such buildings or improvements subject to the lease; or (b) that the lessor might spread over the life of the lease the estimated depreciated value of such buildings or improvements at the expiration of the lease and report as income for each year of the lease an aliquot part thereof), was invalid since the lessor realizes no income as a result of the improvements made by the lessee until the land is sold, no taxable income being received under the Sixteenth Amendment when the building is completed. Again the courts have urged that when the lessor requires the lessee to increase the value of the lessor's property the added value is taxable as income to the lessor, if taxable at all, in the year the value of the property was enhanced.\(^\text{10}\) The Board of Tax Appeals has suggested that income taxable to the lessor from improvements by the lessee should be fixed at their value upon completion, and depreciated at the rate of three and one half per cent over the remaining period of the lease, which sum should be prorated over the life of the leasehold.\(^\text{11}\) The lessor who has acquired a building on previously vacant land has more than a formally different interest and should be held to have realized as income any determinable added value.\(^\text{12}\) Payment of taxes by the lessee in behalf of the lessor constitutes taxable income to the lessor.\(^\text{13}\)

**(B) Deductions Allowable to the Lessor**

Where the lessor pays a certain amount to a lessee to cancel a lease, it has been held that the cost of securing such cancellation of the lease is deductible in the year incurred, and is not to be spread over the unexpired period of the lease.\(^\text{14}\) Later we see the Board reversing itself in a situation in which the lessee paid a lump sum for cancellation of a sublease, disallowing a deduction to the lessee of the amount so paid as an expense, holding that the amount should be amortized ratably over the continuing period of the leasehold.\(^\text{15}\) An interesting situation arose in *379 Madison Ave., Inc. v. Commissioner of Int. Rev.*,\(^\text{16}\) The lessor, a building corporation, took over two leases by assignment in order to procure the lessees as tenants for its own building. The rentals paid by the lessor on the assigned lease exceeded the rentals received by the reletting. The court held that the difference between the two sums was deductible as a business expense and refused to consider the contention that it was a capital investment which would have to be spread over the period of tenancy.

\(^{10}\) Miller *v.* Gearin, 258 Fed. 225 (C. C. A. 9th, 1919); Cryan *v.* Wardell, 263 Fed. 248 (N. D. Cal. 2d, 1920); Crane *v.* Comm'r, 68 F. (2d) 640 (C. C. A. 1st, 1934).

\(^{11}\) Shelby D. Scott, 9 B. T. A. 1219 (1928).

\(^{12}\) The cost of special construction and special features required by the lessee which would be exhausted when the lease was ended does not constitute income to the lessor. Myer Dana, 30 B. T. A. 83 (1934).

\(^{13}\) 49 Stat. 1658, 26 U. S. C. A. § 23 (Supp. 1936). Reg. 94, Art. 23(a)-10: "Taxes paid by a tenant to or for a landlord for business property are additional rent and constitute a deductible item to the tenant and taxable income to the landlord, the amount of the tax being deductible by the latter." This means that if the lessee pays the taxes in behalf of or to the landlord, he may deduct that amount as an ordinary business expense (viz. additional rent). If the lessor includes the money paid by the lessee as part of his (the lessor's) gross income, he may deduct such amounts under the heading of taxes paid, since, had he paid them himself directly they would, as property taxes constitute a deductible item.


\(^{15}\) Steele & Wedeles Co., 30 B. T. A. 841 (1934).

\(^{16}\) 60 F. (2d) 68 (C. C. A. 2d, 1932).
(C) Deductions Allowable to Lessees of Business Property

Rent paid by a lessee to the lessor of business property is deductible as an ordinary and necessary business expense. If a tenant acquires a leasehold for business purposes for a specified sum, he may deduct in his return an aliquot part of such sum each year, based upon the number of years the lease has to run.\(^{17}\) The term "rent" includes taxes and interest which the provisions of the lease require the lessee to pay on behalf of the landlord.\(^{18}\)

If a premium is paid by the prospective lessee to secure a lease, that sum is considered an additional expense of carrying on the business, since it amounts to the payment of a higher rent.\(^{19}\) The amount of the premium paid should be set up as a deferred rent payment, charging off each year the proportion of the premium which has been paid. Advance annual payments made for a number of years before a lessee obtains possession of a building due to an existing lease, are not deductible in the year in which they are made.\(^{20}\) They represent rental paid in advance and should therefore be capitalized and deducted pro rata over the term of the lease beginning when the property comes into the possession of the new lessee.\(^{21}\) If the lessee pays to the lessor a bonus for improvements made by the lessor in addition to those required by the lease and for the speeding up of construction by the lessor, such a sum is an ordinary business expense which the lessee may deduct.\(^{22}\) Again an amount paid by the lessee for cancellation of a lease was held to be a deductible expense in the year paid.\(^{23}\)

If the lessee according to the provisions of the lease, or voluntarily, erects any buildings or makes permanent improvements on the ground of which he is the lessee, the costs thereof are looked upon as a capital investment and do not come under the head of business expenses.\(^{24}\) In order that the lessee may realize a return upon the investment of his capital, he may take an annual deduction from gross income of an amount equal to the total cost of improvements made or buildings erected divided by the number of years remaining under the provisions of the lease. Such a deduction is considered in lieu of a deduction for depreciation.\(^{25}\) If the number of years remaining according to the terms of the lease is greater than the probable life of the improvements, the deduction shall be considered an allowance for depreciations.\(^{26}\) In the early cases brought before the Board of Tax Appeals, the Board held that the period for prorating the cost of improvements made by a lessee is the probable life of the improvements or the term of the lease

\(^{17}\) 49 Stat. 1658, 26 U. S. C. A. § 23 (Supp. 1936); Reg. 94, Art. 23(a)-10.
\(^{18}\) Reg. 94, Art. 23(a)-10.
\(^{19}\) Baton Coal Co. v. Com'r, 51 F. (2d) 469 (C. C. A. 3d, 1931).
\(^{21}\) A bonus paid to secure immediate possession of property under a lease limited to the taxable period and attorney's fees in connection with the transaction were said to constitute necessary business expenses and therefore were deductible. A. R. R. 178, 3 Cum. Bull. 129 (1921).
\(^{24}\) Reg. 94, Art. 23(a)-10.
\(^{25}\) If the lease is for a short term only, the value of the improvements should be spread on a cost basis, that is the cost of the improvements prorated over the number of years of the lease. If the lease is for a long term, the deduction should be taken as an amount deductible for depreciation.
plus renewals and renewal options, whichever is shorter. Later the question was presented to the federal courts and the Circuit Court of Appeals of the Second Circuit reversed the decision of the Board, finding that the deductions should be spread over the term of the original lease disregarding the renewal options where subsequent facts disclosed that the renewal privilege had no value. Taking its cue from the findings of the federal courts, the Board of Tax Appeals in Poly Holding Corp. (in which the physical life of the building was forty years and the period of lease twenty-one years with a renewal option), held that the cost of a building erected on leased premises should be recovered through depreciation spread over the estimated life of the building rather than the term of the original lease without regard to renewal option. This rule is not affected by the possibility that there may be an unexercised option of cancelling the lease prior to expiration.

(D) Special Provisions for Life Insurance Companies

Life insurance companies have been permitted to take deductions for taxes, expenses, and depreciation upon real estate owned and occupied by them in whole or in part, upon the condition that the company will include as gross income the rental value of the premises occupied by it. The validity of such procedure was tested in Helvering v. Independent Life Insurance Co. The 1921 Revenue Act provided that a life insurance company should not be allowed a deduction for depreciation of real property owned and occupied by it, unless the rental value of the space so occupied was included in gross income. The insurance company owned the entire building occupying one floor thereof. It deducted depreciation upon the whole building without including any amount in the gross income for the rental value of the place so occupied. The Commissioner, in accordance with the statutory formula, added to the gross income an amount sufficient to make a net return of four per cent on the book value of the building. The Court approved the action of the Commissioner and held that the statute did not lay a tax on a part of the building occupied by the owner or upon the rental value of that space. Said Mr. Justice Butler: "The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment. . . . Unquestionably Congress has the power to condition, limit, or deny deductions from gross income in order to arrive at the net that it chooses to tax."
Under present regulations the amount allowable as a deduction by the life insurance company is limited to an amount which bears the same ratio to such total depreciation as the rental value of the space occupied by the insurance company bears to the rental value of the entire property. That is, for instance, if the rental value of the space occupied by the company is equal to one-half of the total rental value of the entire property, the deduction for taxes, expenses, and depreciation is one-half of the total taxes, expenses, and depreciation expended on account of the entire property.

II. Property Used for Residential Purposes

(A) Payment of House Rent

In the computation of net income the revenue laws do not permit any deduction to be made by the taxpayer for personal, living, or family expenses. Obviously payments for house rent come under this classification. Article 24-1 of Regulations 94 makes provision for the professional man who uses part of his house for his office, allowing him to deduct such portion of the rent as is properly attributable to such office.

<table>
<thead>
<tr>
<th>Description</th>
<th>Calculation</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Book value of building</td>
<td>$400,000</td>
<td>Book value of the building.</td>
</tr>
<tr>
<td>Rents collected on building (gross income)</td>
<td>$50,000</td>
<td>At 4% average return from such a building.</td>
</tr>
<tr>
<td>Expenses of maintenance</td>
<td>$40,000</td>
<td>Expenses of maintenance: (including taxes and depreciation)</td>
</tr>
<tr>
<td>Return from building after deductions</td>
<td>$10,000</td>
<td>If the insurance company wishes to take a deduction of $40,000, it must add $6,000 to the $10,000 net return to bring the total amount up to 4% of the book value of the building.</td>
</tr>
<tr>
<td>Fair rental value of property occupied by the insurance company</td>
<td>$6,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$16,000</td>
<td>The $16,000 represents the average return from the building at 4% of the book value of the building.</td>
</tr>
</tbody>
</table>

Under the Income Tax Act of 1863, 12 Stat. 713 (1863), express allowance was made for a deduction paid for a dwelling house. But such a deduction is no longer allowed. The owner of real estate who occupies the premises as a residence is not obliged to include the fair rental value of such premises in his gross income tax return, since such value does not represent taxable income under the decision of Helvering v. Independent Life Insurance Co., supra, note 31. This discrimination between the occupier of premises not owned by him and the occupier of premises who is also the owner was sustained as reasonable, i.e., not lacking a valid basis so as to violate the due process requirements of the Constitution. Brushaber v. Union Pacific Ry., 240 U. S. 1 (1916).

If a taxpayer uses a portion of his residence for business purposes, as in the case of a physician or any other professional man who has his office in his residence, a proportionate part of the depreciation sustained may be deducted, the amount to be based generally on the ratio of the number of rooms in the building. The same principle is applicable if a taxpayer rents a portion of his personal residence to other individuals. (Bulletin "F" issued by the Bureau of Internal Revenue, January, 1931, Page 19.)
(B) The Sale of Residential Property

If the taxpayer purchases or constructs property for use as his personal residence and so uses his property up to the time he sells it, he cannot deduct a loss incurred in the sale of that property. Where, however, such property was rented or otherwise appropriated to income-producing purposes prior to its sale and so used up to that time, a loss could be deducted in an amount not to exceed the excess of the value at the time so appropriated (with proper adjustment for subsequent depreciation). Losses sustained by individuals in the sale of property are deductible if the loss is "incurred in any transaction entered into for profit". In Heiner, Collector v. Tindle, et al., the taxpayer purchased land and built a house thereon which he occupied as a residence. He later gave up the home as a residence and thereafter leased the property until some time later when the house was sold at a loss. The Revenue Act then in effect provided that although a home might have been used exclusively for residential purposes, the devotion of the property exclusively to the production of taxable income in the form of rentals would amount to a "transaction entered into for profit". Mr. Justice Stone, speaking for the Court said: ... "The words 'any transaction'... must be taken in their usual sense, and so taken, ... are broad enough to embrace at least any action or business operation... by which property previously acquired is devoted exclusively to the production of taxable income." 

In Larkin v. Collector of Internal Revenue, the Court allowed the owner of property used as a residence to take a deduction for loss where the acts of that owner in abandoning and making every effort to rent the property manifested an intention to sell the property as a transaction entered into for profit. The mere instruction given to an agent to sell or rent the property does not amount to a "transaction entered into for profit from sale or rental of the property". In a case before the Board of Tax Appeals, the

39 Reg. 94, Art. 23(e)-1.
40 275 U. S. 582 (1928).
41 Id. at 585.
42 28 F. (2d) 78 (W. D. N. Y. 1928). In this case the petitioner owned a house in Buffalo, residing there for eleven years. He then built another home moving thereto. He made an effort to rent his former residence over a period of 8 years, finally selling the property, sustaining a loss of $50,000. The court held that the owner of the property suffered a deductible loss on the sale of the property in question. The loss was incurred in a transaction entered into for profit. It was stated: "Abandonment of the home and diligent efforts to rent or sell the same satisfactorily shows that the former residential property was to become and did become a business transaction for gain in a commercial sense."
43 DeFord v. Comm'r, 29 F. (2d) 532 (C. C. A. 1st, 1928). Here the plaintiff bought a home in Brooklyn in 1890, intending to live in it for a short time and then to sell it. He listed the property for sale in 1911 and finally sold it in 1920 at a large loss. In the years 1901, 1902, 1903, and 1904, the plaintiff moved back and forth from Puerto Rico to the home in Brooklyn. The court refused to recognize the sale of the property as a "transaction entered into for profit," holding that the owner resided in the property up to the time of the sale, except for short periods, when it was vacant during his absence from the United States.

Another case, that of Morgan v. Comm'r, 76 F. (2d) 390 (C. C. A. 5th, 1935), presents much the same question. Here the taxpayer built a home in 1913 in Rochester, N. Y., and resided there until 1927, when he was forced to move to Florida because of poor health. He placed the property in the hands of a real estate agent with instructions to rent or to sell it. The agent was unsuccessful, the property finally being sold in 1929, the owner incurring a loss thereon. The court was of the opinion that the loss should not be allowed, since the owner did not remodel or recondition the house or do anything
taxpayer testified that his residence in the vicinity would be temporary and
that he purchased the property in the hope of selling it at a profit whenever
his work required him to move. He occupied the premises from 1921 to
1925, when he offered the property for sale. He finally sold in 1930. The
Board held that the evidence did not overcome the presumption that the
premises had been purchased primarily for use as a residence. The Board
did indicate that a loss would have been allowed if the property had been
rented or offered for rent during the period from 1921 to 1925.

Conclusion

So far as can be ascertained from the decisions of both the courts and the
Board, the tendency of the courts seems to be to allow a deduction for the
loss incurred on the sale of residential property where the owner abandons
the house and makes diligent efforts to sell or rent; that is, openly manifests
an intent to sell.\textsuperscript{45} The attitude of the Board, however, seems to be to deny
a deduction for loss unless the property actually be rented, or has in the
past been rented. The act necessary to establish intention in the eyes of the
Board is the actual renting of the property. It would seem that the position
of the Bureau of Internal Revenue is less sound than the holdings of the
Court in this matter. And what of the situation where the owner of a
home bought for residential purposes moves out and lists the property for
rent, and then takes a loss on the sale of the property? Will a deduction be
permitted to him because of the loss incurred?

F. E. H.

\textsuperscript{45}D. A. Belden, 30 B. T. A. 601 (1934).

\textsuperscript{46}Larkin v. Comm'r, 28 F. (2d) 78 (W. D. N. Y. 1928).
RECENT DECISIONS

AGENCY—Scope of Employment—Authority Express or Implied.

The defendant is the owner and operator of a large chain of grocery stores which function under a system of departmental division, whereby its meat business and its grocery business are separate. The system is so integrated that supplies from one store are removed to another whenever one or the other is under or overstocked. The defendant's superintendent of the meat department of all its Baltimore stores, ordered one Whatmough, "meat manager" of one of the stores to deliver a number of lamb shoulders to a branch store about one mile distant. Whatmough directed a clerk in the grocery department to transport the meat, and, in violation of the superintendent's previous express orders, told the clerk to take his (Whatmough's) private car. The plaintiff, injured by the clerk's conceded negligence in the use of the car while on the errand, brought this action for damages for personal injuries. Held, that while the facts as found by the jury indicate that the clerk was within the scope of his employment, the question as to whether he was expressly or impliedly authorized was for the court, and its submission to the jury constituted reversible error. Great Atlantic & Pacific Tea Co. v. Noppenberger, — Md. —, 189 Atl. 434 (1937).

A master is liable for the tort of his servant committed in disobedience of his master's orders. Gibson v. Dupree, 26 Colo. App. 324, 144 Pac. 1133 (1914); Pittsburgh, C. & St. L. Ry. Co. v. Kirk, 102 Ind. 399, 1 N. E. 849 (1885). But, in the case of Seaboyer v. Davis, 244 Mass. 122, 138 N. E. 538 (1923), the rules of the defendant forbade anyone but licensed chauffeurs to drive trucks. An unlicensed helper endeavored to move the truck in the driver's absence, and in doing so an accident occurred, and it was held that the helper was outside the scope of his employment. Accord: O'Loughlin v. Mackey, 182 App. Div. 637, 169 N. Y. Supp. 835 (2d Dep't 1918). Contra: Adams Express Co. v. Lansburgh & Bro., 262 Fed. 232 (App. D. C. 1920). It is the master's duty not only to give such orders, but to see that they are obeyed. McChung v. Dearborne, 154 Pa. 396, 19 Atl. 698 (1890).

Generally it is agreed that a master is responsible for all acts done by his servant in the course of his employment. Turberville v. Stampe, 1 Ld. Raym. (K. B. 1878). Such liability is predicated upon the great principle of social duty. It is the rule of respondeat superior, the application of which has led to much of the present confusion in the cases and the effect of which would have been avoided had judges generally paid more attention to the policy underlying the doctrine, and less attention to mechanical tests suggested in some cases. Smith, Frolic and Detour (1923) 23 Col. L Rev. 444. In Fiocco v. Carver, 234 N. Y. 219, 137 N. E. 309 (1922), Chief Justice Cardozo said: "We have refused to limit ourselves by tests that are merely mechanical or formal." Like many other common-law doctrines, the limits of this rule have not been fixed with reference to any clearly well-defined policy. Each case must be determined with a view to the surrounding facts and circumstances, the character of the employment, and the nature of the wrongful act—all of which are usually decided by the jury. Collins v. James Butler, 179 N. Y. 156, 71 N. E. 746 (1904) (liability of master for assault committed by clerk). If a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable. Limpus v. London Gen. Omnibus Co., 1 H. & C. 526 (Ex. 1862). The dominant purpose must be proved to be the performance of the master's business.
Where authority is conferred to act for another without special limitation, it carries with it, by implication, authority to do all things necessary to its execution. When it involves the exercise of the discretion of the employee the use of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the employer, and this, although the employee departed from the private instructions of the employer, provided he is transacting the master's business. Rounds v. D. L. & W. Ry. Co., 64 N. Y. 129 (1876). Illustrating this is the case of Williams v. Nat. Cash Register Co., 157 Ky. 836, 164 S. W. 112 (1914), where one Alexander was employed by the master to sell machines in a large territory. The defendant company had knowledge that he used his automobile in soliciting orders, and made no objection thereto, and in that way impliedly authorized its use. A similar case is where one man was employed to solicit business about a city, but not directly authorized to use an automobile. Such fact, it was held, did not relieve the employer from liability for injuries caused by the employee's negligent use of the car. Dishman v. Whitney, 121 Wash. 157, 209 Pac. 12 (1922). But see Laski, The Basis of Vicarious Liability (1916) 26 Yale L. Rev. 105. The author says, at page 121: "The fiction of implied authority is no more than a barbarous relic of individualistic interpretation".

In the old English case of Goodman v. Kennel, 1 Moore & P. 241 (C. P. 1828) Best, J. said: "... a servant's riding the horse of another, without the assent or authority of his master, cannot render the latter answerable for his acts". But the better view would appear to be that if the servant was acting in the course of service, whether he chose to go on foot or horseback (or automobile) is immaterial, for if the injury happened by his misconduct, the master is liable. Patten v. Rea, 2 C. B. N. S. 606 (1857). This use of an unauthorized means in doing an authorized act does not relieve the master. Gibson v. Dupree, supra. That is, the servant is still doing his employer's work, though pursuing it in a way and manner to subserve his interest: therefore, in legal contemplation it is the act of the master.

The principal case is simplified by the fact that there is no question of "frolic and detour", the principle of which was first enunciated in Joel v. Morrison, 6 Car. & P. 501 (N. P. 1834). See also Quinn v. Power, 87 N. Y. 535 (1882) (owner of ferry boat liable for his pilot's negligence after having willfully departed from the prescribed course); Riley v. The Standard Oil Co., 231 N. Y. 301, 132 N. E. 97 (1921); Fiocco v. Carver, supra. But the instant case differs from the usual situation involving an injury to a third party by a defendant's automobile negligently operated by the defendant's regularly employed chauffeur. For here the defendant was not the owner of the car, the servant was not employed to drive the defendant's car, and consequently there is no presumption that the clerk was prima facie within the scope of his employment, as is the fact in the usual case of vicarious liability. McCaughen v. Missouri Pac. Ry. Co., 274 S. W. 97 (Mo. App. 1925). And, while these may seem superficial differences, they are a component part of the important question as to whether there was authority either express or implied. For it is relatively simple to state that the master is responsible for his servant's torts only when the latter is engaged in the master's business or doing the master's work, or acting within the scope of his employment; but to determine in a particular case whether the servant's act falls within or without the operation of the rule presents a more difficult task, which calls for the careful consideration of all the circumstances.
In the present case it would appear that this has been done, and it must follow, therefore, that the decision is correct, both on the question of law and fact.

C. E. W. Jr.


The plaintiff Insurance Company petitioned under the Federal Declaratory Judgments Act for a declaration as to whether life insurance policies had lapsed. There were five policies issued to the defendant, each of which contained a clause waiving payment of premiums during disability. One policy carried a provision obliging the Company, subject to certain provisions, to pay the insured annually one-twentieth of the principal amount of the policy if he should become wholly and permanently disabled. Another promised a specified monthly payment in case of disability. In 1930 and 1931 the insured ceased to pay premiums on four of the policies, claiming disability. Premiums on the fifth, the annuity, were paid until June 1st, 1934. The insured asserted that he was wholly and permanently disabled, and submitted proof of claim, including affidavits and certificates of physicians. Such disability the Company denied, contending that the policy had lapsed for non-payment of premium. The district court dismissed the petition and this order was affirmed by the court of appeals, holding that the suit did not involve a justiciable controversy but was only an “assumed potential invasion of the Company’s rights”. Held: Reversed. Aetna Life Insurance Company v. Haworth et al., —— U. S. ——, 57 Sup. Ct. 461 (1937).

The basic legislative policy underlying the Federal Declaratory Judgments Act, 48 STAT. 955, 28 U. S. C. A. § 400 (Supp. 1936), is the elimination of economic waste resulting from the necessity of proceeding at one’s peril in a dispute. Congressional debates and hearings reveal that the Act was intended to cover precisely the situation involved here. SEN. REP. No. 1005, 73d Cong., 2d Sess. (1934) 2-3; H. R. REP. No. 1264, 73d Cong., 2d Sess. (1934) 2; Hearings Before a Subcommittee of the Senate Committee of the Judiciary on H. R. 5623, 70th Cong. 1st Sess. (1928) 6, 20, 34-35, 43, 54. See 69 CONG. REC. 2026, 2032 (1928). The wisdom and justice of allowing the insurer to bring an action to determine disputed rights under the policy at the time of disability is apparent. Time, following the death of the insured, will obscure the evidence, and in this interim the company must unnecessarily maintain reserves in relation to the policies.

The court held the Federal Declaratory Judgments Act to be constitutional. The statute involves merely the regulation of matters of practice, pleadings, and procedure, and Congress acted within its delegated power over the jurisdiction of the federal courts. It is the nature of the controversy, not the method of its presentation nor the particular party who presents it, that is determinative. The decision in this regard was indicated by Nashville, Chattanooga & St. Louis R. R. v. Wallace, 288 U. S. 249 (1933), in which the court stated that the judiciary clause of the Constitution “did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the Federal courts”. The opening phrase of the Act “in cases of actual controversy” was inserted to secure the constitutionality of the statute and to make clear the self-evident, namely, that there is no federal jurisdiction over a suit which seeks only an abstract advisory opinion or the decision of a moot case.
Muskrat v. United States, 219 U. S. 346, 357 (1911); Liberty Warehouse Co. v. Grannis, 273 U. S. 70 (1927); Willing v. Chicago Auditorium Ass'n, 277 U. S. 274 (1928). The jurisdictional requisite of an "actual controversy" within the meaning of Article III of the Constitution remain unchanged. A declaratory judgment, like any other judgment, can be rendered only in an adversary proceeding between parties having conflicting legal interests which will be definitely affected by a decision conclusively determining their legal relations. The Act does not purport to alter the character of the controversies which are the subject of the judicial power under the Constitution. United States v. West Virginia, 295 U. S. 468, 475 (1935); Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 325 (1936). Non-adversary, non-real, or hypothetical issues cannot be adjudicated.

The view which for so long confused the declaratory judgment with an advisory opinion or a moot case would seem to be finally abandoned. The distinction should be carefully observed. The court will refuse to entertain a case as leading to a mere advisory opinion when the interest of either the plaintiff or the defendant in the action is insufficient to justify judicial determination, or where for any other reason the decree would not affect the legal relations of the parties. Muskrat v. United States, supra; Gordon v. United States, 117 U. S. 697, 702 (1884). A moot case is an action merely fictitious, colorable, hypothetical, academic or dead, involving no actual controversy. In determining whether a case is moot the test is whether, at all stages of the litigation, there is "an actual controversy, and adverse interests", capable of being acted upon by a judgment which can be carried into effect. Lord v. Veaize, 8 How. 251, 255 (U. S. 1850). Where there is no real dispute between the plaintiff and the defendant, either because the suit is collusive from its inception, or because through subsequent events the controversy has been extinguished or the cause of action has ceased to exist, San Mateo County v. Southern Pacific R. Co., 116 U. S. 138 (1885); or where the question sought to be reviewed is wholly abstract, Tregear v. Modesto Irrigation District, 164 U. S. 179 (1896); or the happening of events has rendered it impossible for the court to grant any effective relief, Tennessee v. Condon, 189 U. S. 64 (1903), the cause must be treated as moot and the federal courts are without jurisdiction. For the exercise of judicial power by declaratory judgment there must be a real and substantial controversy raised by one party against another party having adverse interests susceptible of final judicial determination. The dispute must be definite and concrete. The declaratory judgment differs from the traditional judgment only in that it is predicated on no actual violation of rights or threatened irreparable injury, and the relief asked is not an award of process or payment of damages. In connection with the requirement that a judgment be final and conclusive it is now settled that the award of process or execution is not an indispensable adjunct to the exercise of the judicial function by the constitutional courts. Fidelity National Bank & Trust Company v. Swope, 274 U. S. 123, 132 (1927); Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, supra at 263; Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 725 (1929). Coercive relief is not essential to judicial action.

The importance of this decision, besides holding the Declaratory Judgments Act to be constitutional, lies in the clear-cut analysis of the nature of the case proper for declaratory judgment. The fact that this insured has formally presented a claim and is asserting rights under the disability features of the policies, and that he could have brought suit to recover the disability benefits
currently payable under two of the policies, and would have "such an interest in the preservation of the contracts that he might maintain a suit in equity to declare them still in being", further fortifies the case, but should not be regarded as controlling. The procedural innovation of the declaratory judgment should be given a liberal and intelligent recognition.

B. M.

CONTRACTS—Compromise and Settlement.

Mary E. Gillen and her husband, Peter J. Gillen, were indebted to James Gillen, a Catholic priest, in the sum of $3500. They executed three promissory notes as evidence of the indebtedness. Peter J. Gillen died on April 20, 1931. Father Gillen called at the former home of his brother, Peter J. Gillen, on November 26, 1931, entered into an agreement with Mary E. Gillen whereby she was to give him $520 in full settlement of the indebtedness, his stated purpose being to lighten her burden. This sum was paid. At a later time, Father Gillen stated to a daughter of Mary E. Gillen that he was going to come and live with them for the rest of his life after he had resigned from his pastorate. Shortly before the priest was to go and live with the defendant, he died. The executor of his estate sued for the remainder of the amount due under the promissory notes. Held, a possibility of the creditor's receiving a benefit from being able to obtain a suitable home for himself upon his resigning and retiring from his pastorate constituted a sufficient consideration to sustain the contract to take less than the amount due him on his brother's note in full payment thereof. In re Gillen's Estate, Hempen v. Gillen, —— Ill. App. ——, 6 N. E. (2d) 257 (1937).

It appears that at the time of the agreement to accept the lesser sum in full satisfaction of the indebtedness, no mention was made of the plan that Father Gillen go to live with the defendant. Nevertheless, the court apparently interpreted this later agreement as entering into the original agreement of settlement and used it as additional consideration sufficient to support the compromise agreement.

The common law rule, that an agreement to accept in full settlement a less sum than the total amount claimed by the creditor and admitted by the debtor to be due, is void for want of consideration to support it, is recognized universally by the courts. Peachy v. Witter, 131 Cal. 316, 63 Pac. 468 (1901); Bostrom v. Gibson, 111 Ill. App. 457 (1903); Upton v. Dennis, 133 Mich. 238, 94 N. W. 728 (1903); Thomas v. Hill Top Section of German Beneficial Union, 260 Pa. 1, 103 Atl. 504 (1918); Stephens v. Curtner, 205 Mo. App. 255, 222 S. W. 497 (1920); First Nat. Bank v. Cartoni, —— Mass. ——, 3 N. E. (2d) 177 (1936). There have, however, been variations of this rule. A promise made by a creditor to accept less than the full amount of his demand is not enforceable, unless there be some new consideration to support it. In re Maurer, 1 Woodw. Dec. 268 (Pa. 1865). Any consideration, however small, will support compromise and settlement. Du Puy v. U. S., 35 F. (2d) 990 (Ct. Cl. 1929), cert. denied, 281 U. S. 739 (1930); Forsythe v. Rexroat, 234 Ky. 173, 27 S. W. (2d) 695 (1930). Any benefit to the creditor or detriment to the debtor would support an agreement to accept less than the amount admittedly due. Such benefit or detriment, however, must be something more than receipt by creditor and payment by debtor of part of an indebtedness, for otherwise the general rule requiring consideration for such an agreement would be abrogated. National Surety Co. v. American Finance Co. of Galveston, 41 S. W. (2d) 66 (Tex. Civ. App. 1931).
It must not only be shown that the party against whom the agreement is invoked was satisfied with the transaction, but it must further be shown that he received some consideration which would compensate him in law for accepting a less amount. *Nies v. Metropolitan Casualty Ins. Co. of N. Y.*, 317 Pa. 545, 177 Atl. 754 (1935). It is not essential, in order to make out good consideration for a promise, to show that the promisor was benefited or the promisee injured; a waiver on the part of the latter of a legal right is sufficient. The detriment incurred by the promisee is sufficient consideration. *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256 (1891). A benefit to the promisor is a sufficient consideration for a promise when it consists in a detriment to the person to whom it is made. *Bibb v. Hitchcock*, 49 Ala. 468 (1873).


Many courts have spoken of benefit or possibility of benefit as being sufficient consideration. But the words "possibility of benefit" do not mean benefit which is contingent or uncertain. As pointed out in the case of *Thompson v. Percival*, 5 B. & Ad. 925 (K. B. 1834), the consideration derived may be more beneficial or more convenient. And it was held that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum*, but if there be any benefit or even legal possibility of benefit to the creditor added, that additional weight will turn the scale and render the consideration sufficient to support the agreement. *Cumber v. Wane*, 1 Strange 426 (K. B. 1795); followed in *Foakes v. Beer*, 9 App. Cas. 605 (1884).

Where a debt, owing and liquidated, was paid off with several promissory notes aggregating a much lesser sum, the court held that if there be some additional benefit or legal possibility of benefit to the creditor, this will be a sufficient consideration to support an agreement to accept the lesser sum. *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351 (1891). A negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt which was not negotiable. *Sibree v. Tripp*, 15 M. & W. 26 (Exch. 1846).

Justice Andrews stated in the case of *Allison v. Abendroth*, 108 N. Y. 470, 15 N. E. 606, 607 (1888): "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not *nudum pactum*, and the doctrine of the common law to which we have adverted has no application."

After examining the cases on this point, it is apparent that the least legal consideration is sufficient to sustain a contract for the payment of a larger sum with a smaller. The majority rule seems to be that consideration is any detriment to the promisee, not necessarily injurious but at least the giving up a legal right. But none of the courts have gone so far as to say that a *possibility* of legal benefit is sufficient. Some of the courts have spoken of "pos-
sibility of benefit ", but as seen in the case of Thompson v. Percival, supra, the phrase is used in the sense of the benefit being more convenient or beneficial. The phrase has also been used in defining additional security given to the promisor. In the principal case nothing passed other than the smaller sum of money. There was a benefit to be derived in the future and this rested upon a possibility. No detriment was occasioned to the promisee nor a benefit to the promisor. In view of the relations of the parties the court certainly reached the equitable result, but in doing so it seems to have extended its view of consideration somewhat beyond the classical concept.

S. A. S.

CORPORATIONS—Sale of Corporate Assets.

Plaintiff, in 1928, owned 22% of the corporate stock of the Page & Hill Company, defendant. The corporation was organized in Minnesota, under statutes relating to corporations organized for pecuniary profit, and which provided that such corporations could acquire, hold and transfer such real estate and personal property as was necessary for carrying on or disposing of the business of the corporation. In 1929 some of the stockholders of defendant organized a Delaware corporation under a similar name. The board of directors of defendant sold all of the assets of defendant to the new corporation, stock in the new corporation being accepted as payment. This was done with the consent of the stockholders of defendant other than the present plaintiff. Plaintiff refused to consent or accept his proportionate share of the stock of the new corporation. It appeared that defendant corporation had been steadily losing money. Held, the majority of the stockholders of defendant were authorized; under the circumstances of the case, to sell the corporate assets of the corporation to another corporation, organized by such stockholders, and to accept in payment stock in the newly formed corporation in lieu of cash. Hill v. Page and Hill Co. et al., —— Minn. ——, 268 N. W. 705 (1936).

At common law the right of a corporation, acting by a majority of its stockholders to sell its property, is absolute and is not limited as to objects, circumstances or quality. Angell and Ames, Corporations §§ 127-135. Corporations of a quasi-public character form an exception to this rule. They may be restrained from alienating their corporate assets. But the rule is different with corporations of a strictly private character and organized for pecuniary profit. They may cease business or sell their assets, where in the exercise of sound discretion it would be contrary to the interests of the stockholders to continue. Treadwell v. Salisbury Mfg. Co., 7 Gray 393 (Mass. 1856). In the absence of special authority to do so, the owners of a majority of stock in a corporation may not authorize the directors to sell the corporate assets and abandon the enterprise for which the corporation was organized. Geddes v. Anaconda Mining Co., 254 U. S. 590 (1921). But where there is some exigency or condition requiring the sale of an unprofitable concern, the majority may act. Smith v. Stone, 21 Wyo. 62, 128 Pac. 612 (1912). Such actions, in good faith and without fraud, will not be enjoined by the courts. Jackson Co. v. Gardiner Investment Co., 217 Fed. 350 (C. C. A. 1st, 1914). There cannot be a sale of a prosperous going concern where there is the slightest objection. Des Moines Life and Annuity Co. v. Midland Ins. Co., 6 F. (2d) 228 (D. C. D. Minn. 1925). But in Bowditch v. Jackson Co., 76 N. H. 351, 82 Atl. 1014 (1912), it is said that a majority can sell, even
where the corporation is solvent and a going concern. The court therein based its ruling on a common sense doctrine, stating that thereby the corporation might better profit. Generally, it may be said that the power of a majority to dispose of the property of a losing concern is in furtherance of the purposes of the corporation and arises \textit{ex necessitate}.

Where the statute under which the corporation was organized prescribes the manner in which it may be dissolved, the minority stockholders must abide by such statutory provision. In such cases a shareholder is presumed to know the power and authority conferred upon the majority stockholders, and in the absence of fraud the minority stockholders cannot complain. \textit{Metcalf v. American School Furniture Co.}, 122 Fed. 115 (C. C. W. D. N. Y. 1903). Every stockholder subscribing to stock impliedly agrees to be bound by the will of the majority. Such action must be in the interest of the corporation and in good faith. \textit{Wheeler v. Pullman Iron and Steel Co.}, 143 Ill. 197, 32 N. E. 420 (1892). Unfair action or action contrary to the interests of the corporation is invalid. \textit{Chicago Hansom Cab Co. v. Yerkes}, 141 Ill. 320, 30 N. E. 667 (1892).

Where the action of directors, in carrying out the wishes of the majority is challenged, the burden of showing the fairness of the transactions is upon those who would maintain them. \textit{Twin Lick Oil Co. v. Marbury}, 91 U. S. 587 (1875). Where there is a statute any sale of corporate assets must be in accord with the statute. \textit{Meyerhoff v. Bankers Securities et al.}, 105 N. J. Eq. 76, 147 Atl. 105 (1929). Minority stockholders have an equitable lien to the extent of the sum due them, upon the property of the old corporation, transferred to the new corporation. \textit{Ervin v. Oregon Ry. and Nav. Co.}, 27 Fed. 625 (C. C. S. D. N. Y. 1886). A single shareholder may prevent the attempted \textit{ultra vires} act of the corporation. \textit{Grausman v. Porto Rican Tobacco Co.}, 95 N. J. Eq. 155, 121 Atl. 895 (1923). Ordinarily suits are brought by the corporation but where the corporation is unable to sue or will not, then it may be joined as a party defendant. \textit{Hodges v. N. E. Screw Co.}, 1 R. I. 312 (1850); \textit{Allen v. Curtis}, 26 Conn. 456 (1857).

Sales of the corporate property are generally made for cash, and a minority stockholder cannot be compelled to accept any other means of payment. \textit{Koehler et al. v. St. Mary's Brewing Co. et al.}, 228 Pa. 648, 77 Atl. 1016 (1910). But where the sale is for stock, easily ascertainable and readily reducible to cash by the recipients thereof, the sale will be upheld. \textit{Geddes v. Anaconda Copper Mining Co.}, supra.

In the principal case there appears to be express statutory authority for the action of the directors in selling the assets of the old to the new corporation. Even were there not such authority the case is clearly one necessitating such action, and therefore coming under the exception as exemplified in cases cited.

W. P. D.

CRIMINAL PROCEDURE—Change of Venue.

The grand jury of Fayette County returned indictments against the defendants, the district attorney, his associates, and other prominent citizens of that county who were alleged to have been widely known, each having a large personal following, political, professional, and social. This fact, it was claimed, would have made it impossible to secure an impartial and unbiased jury. It was further alleged that concerted effort was being made by the
defendants and other persons prominent in public life in the county to create 
sympathy and prejudice for the defendants in the approaching trial. For 
these, among other reasons, the attorney-general presented a petition for a 
change of venue. Held, that the Commonwealth was entitled to a change of 
venue in order to secure a fair and impartial trial. Commonwealth v. Reilly 

The general rule at common law, that if a fair and impartial trial could 
not be had in the county in which the offense was committed, the accused 
could apply for and obtain a change of venue to the adjoining county, is well 
settled, and is further firmly intrenched by statute in this country. Clark, 
Criminal Procedure (2d. ed. 1918) 144; State v. Albee, 61 N. H. 423 
(1881); see Rex v. Cowle, 2 Burr. 834 (K. B. 1759). A statute allowing a 
change of venue on the defendant's application, or with his consent, is not in 
violation of the constitutional provision that the trial shall be had in the 
county where the offense was committed or the indictment presented. The 
defendant may waive his privilege to be tried there. State v. Albee, supra; 
Dula v. State, 8 Yerg. 511 (Tenn. 1835); Perrett v. People, 70 Ill. 171 (1873).

But as to the question of the state's application for a change of venue into 
another county in a criminal prosecution, there is a split of authority. In 
England it seems well settled that where a separate trial cannot be had in 
the county where the indictment is found, a change of venue may be made 
to, or at least, the jury may be drawn from, another county, upon motion by 
the prosecution. Rex v. Harris, 3 Burr. 1330 (K. B. 1762); Rex v. Notting-
ham, 4 East. 208 (K. B. 1803).

In several cases in this country the opinion is expressed that a change of 
venue upon the application of the prosecution is authorized by common law 
where an impartial and fair trial cannot be had in the county or vicinage of 
the offense. Hewitt v. State, 43 Fla. 194, 30 So. 795 (1901); People v. Per-
348, 25 Pac. 481 (1891); In re Nelson, 19 S. D. 214, 102 N. W. 885 (1902).

In most states and in the federal jurisdiction the area within which the 
trial must be had or from which the jury must be empanelled is set forth 
in the respective constitutions. Some state constitutions make no mention 
of the county wherein the crime was committed but simply provide that the 
accused shall have "a speedy and impartial trial by jury". All these juris-
dictions with one exception (California) have held statutes such as the 
present valid. For the most part they declared that venue is a matter of 
statutory regulation. Since this power is not denied the legislature either 
impliedly or expressly, statutes granting the change of venue are valid. People v. Webb, 1 Hill 179 (N. Y. 1841); McMillan v. State, 68 Md. 307, 
12 Atl. 8 (1888); People v. Furbish, 103 Mich. 593, 61 N. W. 865 (1895). 
People v. Powell, supra, which holds against the above rule, bases its reason-

ing on the ground that the state did not possess this right at common law. 
But no notice is taken of the fact that at common law the trial could be re-
moved to the Court of King's Bench, and there tried to a jury of another 
county. A majority of the states have constitutions providing that the jury 
shall be drawn from the "county" or "district" in which the offense is 
alleged to have been committed and they limit the right to change of venue 
to the accused alone and deprive the prosecutor of such relief. Ex Parte 
Rivers, 40 Ala. 712 (1867); Osborne v. State, 24 Ark. 629 (1867); State v. 
Greer, 22 W. Va. 800 (1883). There is a strong minority of states with 
constitutional provisions of this type which hold statutes granting the state
a change of venue valid. *State v. Holloway*, 19 N. M. 528, 146 Pac. 1066 (1914); *State v. Hewitt*, supra.

In *Commonwealth v. Davidson*, 91 Ky. 162, 15 S. W. 53 (1891), it was pointed out that the State Constitution (Art. 13 § 12) declared that a person accused of a crime has a right to a speedy public trial by an impartial jury of the vicinage; Art. 2 § 38 provided that the general assembly should not change the venue in any criminal prosecution but should provide for the same by general law. The case held that the Kentucky Act of 1890, providing for a change of venue on the application of the Commonwealth where an impartial trial cannot be had in the county where the crime was committed, is constitutional. The theory of the minority is that each citizen has impliedly consented that the state shall have the right to enforce the laws and if unable to do so within that particular county, a change of venue will be granted. Also, that a trial by jury is taken to mean an impartial jury, and upon proof that one cannot be obtained in that county, the state as well as the accused should be allowed to try the case where an impartial jury can be obtained. These conclusions are more consonant with sound reason and support the institutions they are designed to protect.

It appears also that the state’s right to a change of venue in a criminal prosecution to another county does not violate the accused’s rights given to him by Amendment VI of the Federal Constitution which provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .” The above amendment is not a limitation on state courts, but applies exclusively to federal criminal procedure. *Gut v. Minnesota*, 9 Wall. 35 (U. S. 1869); *Gaines v. Washington*, 277 U. S. 81 (1928). In *People v. Rich*, 237 Mich. 481, 212 N. W. 105 (1927), it was held that granting a change of venue upon the application of the state did not offend the Federal Constitution, the court stating that in *Gut v. Minnesota*, supra, it was settled by the Supreme Court of the United States that such legislation by the state presented no federal question.

In the principal case, we have as a guide the State Constitution which provides: “In all criminal prosecutions the accused hath a right . . . in prosecution . . . by indictment or information, to a speedy public trial by an impartial jury of the vicinage.” Vicinage, used in the above constitution, is found in few others and is of uncertain meaning. It is not coterminous with county and may, in fact, embrace more than one county; this is clearly established by the case of *Commonwealth v. Collins*, 268 Pa. 295, 110 Atl. 738 (1920). The primary and literal meaning of vicinage is neighborhood or vicinity, but neither of these terms definitely indicates just what territory it embraces. A county, on the other hand, is a definitely designated territory. While vicinage comprehends or includes the venue, *Commonwealth v. Collins*, supra, the two are not necessarily coextensive. The main consideration is to give a speedy trial before an impartial jury drawn from an area broad enough to secure it. Therefore, vicinage must be expanded to meet that situation and when, for potent reasons, the locality of the venue cannot produce such a jury, the venue must be moved within the vicinage, in this broad sense, to a place where an impartial jury can be obtained.

P. N. C.
EQUITY—Federal Equity Rules—Interpretation.

The Carlisle Packing Company was adjudged bankrupt on February 9, 1934. The United States claimed income taxes for 1927, 1928, and 1929. The referee concluded that there was no taxable income for the period in question, disallowed the claim, and denied the contention of the United States that a judgment of the Board of Tax Appeals sustaining the claim was binding upon the bankruptcy court. The time for contesting the Board's judgment had not expired when the petitioner was adjudged bankrupt. After the bankrupt's tax returns had been made a part of the record on motion of the United States the district court disaffirmed the referee's action, and held that neither the judge of a district court nor a referee in bankruptcy had power to re-determine a deficiency which had been sustained by the Board of Tax Appeals. In re Carlisle Packing Co., 12 F. Supp. 11 (W. D. Wash. 1935). On appeal to the circuit court portions of the record in the district court, certified as correct by the clerk, were filed. On motion of the United States the district court's opinion, having been omitted through inadvertence only, was made a part of the transcript. The record was not properly authenticated within the requirements of Equity Rules 75(b), or 77, 28 U. S. C. A. § 721 (1926), there being neither a certification of evidence taken in the district court, nor a certification of an agreed statement of questions to be considered by the appellate court. Both sides, however, treated the abstract returned by the referee as correct, and extended argument and voluminous briefs were based on the statements contained in the abstract. The circuit court, by its own motion, raised objection to the record and held that, in view of the fact that neither statement mentioned above was before it, it would be presumed that the evidence supported the judgment. Accordingly, the judgment of the district court was affirmed. Kelly v. United States, 83 F. (2d) 783 (C. C. A. 9th, 1936). A petition for rehearing and request that the record be returned to the district court for proper authentication was denied. Kelly v. United States, 84 F. (2d) 541 (C. C. A. 9th, 1936). Held, where mere omission has escaped the attention of both parties, and a rigorous enforcement of the equity rules will prevent a hearing on the merits, it is an abuse of discretion to deny a timely request to have the error corrected, such a denial being a violation of the spirit of the rules. Kelly v. United States, 299 U. S. ——, 57 Sup. Ct. 335 (1937).

If two cases can be said to indicate a tendency, the principal case, taken with the case of American Life Insurance Company v. Stewart, 299 U. S. ——, 57 Sup. Ct. 377 (1937), points the way to a revivification in the federal courts of the equity of the Chancellors. See Pound, The Decadence of Equity (1905) 5 Col. L. Rev. 20. Compare Simpson, Fifty Years of Equity (1936), 50 Harv. L. Rev. 171.

In the Stewart case, supra, the Court declared itself in favor of an extremely liberal interpretation of the traditional test of equity jurisdiction, the adequacy of the remedy at law. The remedy at law must share an "equality in efficiency . . . , in certainty . . . , in promptness" to supplant the remedy in equity. See (1937) 25 Georgetown Law Journal 752. The significance of the principal case lies not in the decision itself but in its implications. Decided the same day as the Stewart case, supra, it gives notice to the Circuit Court of Appeals for the Ninth Circuit, as the Stewart case, supra, gives to the Tenth, that the discretion of an equity court is today to be exercised in the way of the older equity.

N. C.
EQUITY—Restrictive Covenants against Alienation.

A group of eight lots in the District of Columbia was developed as a subdivision during the years 1901 to 1905 and immediately thereafter conveyed by deeds, all of which contained covenants to the following effect: "Subject also to the covenant that said lot shall never be rented, leased, sold, transferred, or conveyed unto any negro or colored person under a penalty of two thousand dollars ($2,000.00), which shall be a lien against said lot". Six of the lots are on the east side of First Street, the west side of which is the border of an extensive colored district. The other two lots are on the south side of S Street and together with the six lots comprise a white neighborhood which extends eastward along S Street. The plaintiff, in his own behalf and as the representative of the other owners of the six lots, brought a bill to remove a cloud on title and asked that the restrictive covenant be lifted as against-objecitng owners of the other two lots, since ". . . by reason of the occupancy by colored persons of the territory immediately west of the property in question, the plaintiff's property has been damaged, and . . . it could not result in damage to the defendants to have the restriction removed". Held, restrictive covenants of this nature are valid, and being intended primarily to protect the property within the restricted area, should not be set aside merely because of conditions affecting the surrounding area. Removal of the restriction was denied. Grady v. Garland, — App. D. C. — (1937).

Covenants which restrict the alienation of property, the fee of which has been conveyed, are frowned upon by the courts generally as being inconsistent with the title given; and those against alienation to colored persons, or to those not of the Caucasian race, have been held void. White v. White, 108 W. Va. 720, 150 S. E. 531 (1929); Porter v. Barret, 233 Mich. 373, 206 N. W. 532 (1926); Schulte v. Starks, 238 Mich. 102, 213 N. W. 102 (1927); Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919). In the District of Columbia, however, such restrictions have been sustained. Corrigan v. Buckley, 55 App. D. C. 30 (1924) appeal dismissed 271 U. S. 323 (1924); Torrey v. Wolfe, 56 App. D. C. 14 (1925); Russell v. Wallace, 58 App. D. C. 357 (1929); Cornish v. O'Donoghue, 58 App. D. C. 359 (1929). Missouri and Louisiana have also sustained covenants against alienation to colored persons. Koeler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918); Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915). And even jurisdictions which will not recognize restrictions against alienation to groups or classes will give effect to restrictions against the use or occupancy by such groups. Parmalee v. Morris, 218 Mich. 625, 188 N. W. 330 (1922); Schulte v. Starks, 238 Mich. 102, 213 N. W. 102 (1927); Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Wayt v. Patte, 205 Cal. 46, 269 Pac. 660 (1928).

Where there has been such a material change in the character of the restricted area that enforcement of the restriction would be inequitable, courts of equity will lift the limitation. Latteau v. Ellis, 122 Cal. App. 584, 10 P. (2d) 496 (1932). Here the protected area had become largely colored, defeating the purpose of the restriction. The real difficulty in instances where attempts are made to overthrow the covenant exists in the application and limits of the "materially changed character" rule. A Connecticut case states the rule to be based upon circumstances "Where radical change in condition completely defeats the purpose of the covenant in the restricted area." Bickell v. Moraio, 117 Conn. 176, 167 Atl. 722 (1933).

Situations where the conflicting conditions, occupations or uses border closely without mingling, often bring forth allegations of material change in condition. The court in the principal case took the view that “the restriction is for the protection of the property to which it applies and is not affected by similar conditions which may arise in adjoining property”. *Castleman v. Avignon*, 56 App. D. C. 253 (1926); *Cuneo v. Chicago Title & Trust Co.*, 337 Ill. 589, 169 N. E. 760 (1930).

The fact that lots about the fringe of the restricted area would be more valuable for other purposes, or that they bear more heavily than the sheltered portion the burden of the expanding condition against which the covenant was designed, will not justify equity in stripping the covenant from the protected property. *Rombauer v. Compton Heights Christian Church*, 328 Mo. 1, 40 S. W. (2d) 545 (1931); *Strong v. Shatto*, 45 Cal. App. 29, 187 Pac. 159 (1919); *Continental Oil Co. v. Fennemore*, 38 Ariz. 277, 299 Pac. 186 (1931); *Van Meter v. Marion*, 178 Okla. 31, 38 P. (2d) 557 (1934); *Commercial Realty Co. v. Pope*, 171 Okla. 331, 43 P. (2d) 62 (1935); *Wine- man Realty Co. v. Pelavin*, 267 Mich. 594, 255 N. W. 393 (1934). But a single owner in a tract restricted to residences has been allowed to erect a business building where business had advanced to the other side of the street, but the tract was untouched. *Downs v. Krueger*, 200 Cal. 743, 254 Pac. 1101 (1927).

Although contrary to the weight of authority as to the validity of restrictive covenants against alienation to colored persons, the principal case properly applies the test in determining what change in the character of the restricted area is necessary before the aid of equity may be invoked to relieve against a covenant originally valid by the law of the jurisdiction. That test is, that the change must be material to the restriction and of such a nature as to have defeated the purpose of the restriction as related to the area itself, and not a product of wishful thinking or a change in the surrounding territory alone.

J. M. C.

EXECUTORS AND ADMINISTRATORS—Retainer—Administrator Distinguished from Trustee.

The defendant had been removed as administratrix of her deceased husband’s estate. On settlement of her final account she was found chargeable with a balance beyond her allowable credits. She and her surety were sued on her bond by the administrator *de bonis non* for her refusal to pay over this balance. One defense was in the nature of a set-off, the deposed administratrix claiming that the balance which she had retained was due her as compensation for services which she had rendered her husband, equivalent to those of a housekeeper and a bookkeeper. *Held*, an administrator acts in a trust capacity and funds coming into his hands in that capacity are trust funds. Since the administrator is a trustee, he cannot set off his individual demand against assets of the estate which he obtains by virtue of his office. *Williams et al. v. Williams*, —— Ohio App. ——, 5 N. E. (2d) 956 (1935).

At common law, an administrator cannot sue himself to recover a debt due him as an individual from the estate. *Perkins v. Se Ipsam, adm’x*, 11 R. I. 270 (1875). However, a personal representative is entitled to retain
assets of the estate in payment of *bona fide* debts due him from his intestate, or to a credit for the amount of such an indebtedness on a settlement of his administration. *Kirkev v. Kirkev*, 41 Ala. 626 (1868); *Dickie v. Dickie*, 80 Ala. 37 (1885); *Allen v. Allen*, 179 Ga. 383, 175 S. E. 793 (1934); *In re Morgan's Estate*, 152 Wis. 138, 139 N. W. 745 (1913). See 3 *Alexander, Wills* (1918) 1500; 3 *Jarman, Wills* (7th ed. 1930) 1973. Apparently the only qualification of this right in Ohio is that before retainer will be permitted, the personal representative must prove his claim in the court of probate. *Ohio Gen. Code Ann.* (Page, 1926) § 10727.

While the court in the principal case, therefore, departs from precedent in denying the existence of a right of retainer, the result reached may be justified on either of two grounds. First, it does not appear that the disputed claim was proved as required by the Ohio Code, *supra*. Second, a wife is probably not entitled to payment for domestic services performed for her husband. See *Bechtol v. Ewing, adm'r*, 89 Ohio St. 53, 58, 105 N. E. 72, 73 (1913); *Merrick v. Ditzler*, 91 Ohio St. 256, 110 N. E. 493 (1915). Nor, if Ohio follows the general rule on the subject, is she entitled to compensation for aiding her husband in his business. *Brooks v. Schwerin*, 54 N. Y. 343 (1873); *Standin v. Pennsylvania R. R. Co.*, 214 Pa. 189, 63 Atl. 467 (1906). See also, *Lund v. Lund*, 41 N. H. 355 (1860); 3 *Schouler, Wills* (6th ed. 1923) 2294.

While there is some authority for this court's treating an administrator as trustee, the better opinion is to the contrary. Courts have spoken loosely of personal representatives as trustees. *Hardwick v. Catterill*, 221 Ky. 783, 785, 299 S. W. 958, 959 (1927); *Windoess v. Colwell*, 247 Mich. 372, 375, 225 N. W. 573, 574 (1929); *Miller v. Miller*, 200 N. C. 458, 157 S. E. 604 (1931) (Statute of Limitations applicable to trustees applied to an administrator); *Ledyard v. Bull*, 119 N. Y. 62, 72, 23 N. E. 444, 446 (1860); *Love v. Albertson*, 78 App. Div. 607, 614, 79 N. Y. Supp. 947, 950 (2d Dept. 1903); *In re Johnson's Estate*, — — Wash. — —, 60 P. (2d) 271 (1936). In spite of this persistent error, executors and administrators are not trustees in any strict sense. *Caruso v. Caruso*, 103 N. J. Eq. 487, 496, 143 Atl. 771, 775 (1928), citing the earlier case of *In re Hibber's Estate*, 78 N. J. Eq. 217, 219, 78 Atl. 188, 189 (1910). But there are points of similarity between the offices which might lead to the supposition that a personal representative is a trustee. A similar degree of care in managing the estate is exacted of both. Compare *Barth v. Fidelity & Columbia Trust Co.*, 188 Ky. 788, 799, 224 S. W. 351, 357 (1920) with *Exchange Trust Co. v. Doudera*, 270 Mass. 227, 170 N. E. 73 (1930); *Speight v. Grant*, 9 App. Cas. 1, 19-20 (1883). The nature of the interests taken by personal representative and trustee respectively are similar; as are the interests taken by legatee or distributee on the one hand, and *cestui qui trust* on the other. See 1 *Bogert, Trusts and Trustees* (1935) 12. Personal representatives are included in the broad class of fiduciaries. See *Barth v. Fidelity & Columbia Trust Co.*, *supra*; *In re Seidelman's Estate*, 261 Pa. 540, 104 Atl. 799 (1918). This class, of course, includes trustees.

There are distinctions between the offices. A trustee is ordinarily a permanent officer with duties of investment and management not ordinarily found in executorships or administratorships; the personal representative is a temporary officer. 1 *Bogert, loc. cit. supra*. So, an executor has been held guilty of gross negligence in proceeding as trustee rather than executor for thirteen years without a final settlement of the estate. *In re McElevy's Estate*, 305 Mo. 244, 266 S. W. 123 (1924).
A personal representative is an officer of the court which appointed him in a sense not true of the trustee. 1 Bogert, loc. cit. supra. This distinction is made in the case of Squier v. Houghton et al., 131 Misc. 129, 226 N. Y. Supp. 162 (Sup. Ct. 1927), in which the court refused to entertain an action against executors appointed in New Jersey, but retained jurisdiction as to trustees appointed under the same will, assigning as its reason that the executors were officers of the foreign court, but the trustees were on the same footing as any other residents of foreign states.

A third distinction exists in the exercise of powers. It is not necessary that all of several executors join in performing a function requiring exercise of discretion, Pearse v. National Lead Co., 162 App. Div. 766, 147 N. Y. Supp. 989 (Sup. Ct. 1914); whereas all trustees of a private trust must unite in performing their functions as such, Bitker v. Hotel Duluth Co., 83 F. (2d) 721 (C. C. A. 8th, 1936), in the absence of a stipulation to the contrary. Daybill v. Lucas, —— N. J. Eq. ——, 187 Atl. 734 (1936). These distinctions are of more than theoretical value. It may be of some practical importance to distinguish between the offices under discussion, in cases involving taxation of estates, or where the Statutes of Limitations applicable to trustees and to personal representatives are of different length. See Restatement, Trusts (1935) § 6, comments e. g. And the principal case affords an example of the denial of a well settled right because a court overlooked the clear distinction that exists between the offices.

J. K.

HOMICIDE—Instructions to Jury—Degrees of Offense.

Pursuant to a pre-conceived plan to rob the National Bank of Lacona, the defendants entered the bank in broad daylight. The decedent, who was sitting in one corner of the room, arose. The defendants ordered him back and when he refused the defendants, both of whom carried revolvers, shot and fatally wounded him. After the arrest, both made full confessions, although both offered defenses, including that of abandonment, which were duly submitted to the jury and duly rejected by them. The error assigned on appeal is that the court submitted the case to the jury on a felony murder count only and charged that it must find the defendants guilty of murder in the first degree or acquit them. Held, that where there is a possibility of finding defendants guilty of a lesser crime, the jury must not be left without an alternative. But in felony murder cases, where the facts are susceptible of one interpretation only, defendants are guilty of murder in the first degree or they are not guilty and the court may properly refuse to charge a lesser degree of homicide. People v. Stevens et. al., —— N. Y. ——, 6 N. E. (2d) 60 (1936).

Upon the precise point in the main case there seems to be considerable controversy, and although the general rule announced in this case is well established, People v. Sanchez, 24 Cal. 17 (1864); Morgan v. State, 51 Neb. 672, 71 N. W. 788 (1897); State v. Sexton, 147 Mo. 89, 48 S. W. 452 (1898); People v. Nunn, 120 Mich. 530, 79 N. W. 800 (1899); State v. Rose, 129 N. C. 575, 40 S. E. 83 (1901); State v. Young, 67 N. J. L. 223, 51 Atl. 939 (1902); Commonwealth v. De Leo, 242 Pa. 510, 89 Atl. 584 (1914); People v. Chapman, 224 N. Y. 463, 121 N. E. 381 (1918) still there is room for argument, as exemplified by the dissenting opinion of Lehman, J. in the principal case.

Pursuant to a general rule at common law, and now comprising the general practice, when an indictment charges an offense that includes within
its description another offense of a lower degree or grade, the jury may properly find the accused guilty of the lesser offense. Dinkey v. Commonwealth, 17 Pa. 126 (1851); Whilden v. State, 25 Ga. 396 (1858); Graves v. State, 45 N. J. L. 347 (1883); People v. McFarlane, 138 Cal. 481, 71 Pac. 568 (1903); State v. Reyno, 68 Kan. 348, 74 Pac. 1114 (1904); State v. Averill, 85 Vt. 115, 81 Atl. 461 (1911). And it is a familiar application of the doctrine that under an indictment charging murder in the common law form, the defendant may be convicted of any of the grades of homicide. People v. McFarlane, supra.

But there are conditions in many cases which justify certain exceptions to this general practice. Such are cases where the legislature declares certain homicides to be in the first degree when perpetrated during the commission of another felony, such as, burglary, People v. Schleiman, 197 N. Y. 383, 90 N. E. 950 (1910); Christian v. State, 71 Tex. Cr. 566, 161 S. W. 101 (1913); robbery, Commonwealth v. De Leo, supra; rape, State v. Kaufman, 335 Mo. 611, 73 S. W. (2d) 217 (1934); People v. Stevens, supra; or where homicide is perpetrated in such a way that the law attaches to it all the elements of first degree murder, as by administering poison, McMeen v. Commonwealth, 114 Pa. 300, 9 Atl. 878 (1887); or the commission of homicide after lying in wait, People v. Repke, 103 Mich. 459, 61 N. W. 861 (1895).

The same rule obtains where a case stands out in relief as murder in the first degree, and the court is justified in charging generally on murder in that degree, Augustine v. State, 41 Tex. Crim. Rep. 59, 52 S. W. 77 (1899). This is true in cases where the facts point to only one logical conclusion or where the evidence is susceptible of one interpretation only. Contra: State v. Watts, 232 Mo. 511, 134 S. W. 555 (1911); cf. People v. Koerber, 244 N. Y. 147, 153 N. E. 79 (1926); People v. Kropowitz, 271 N. Y. 505, 2 N. E. (2d) 668 (1936), where by statute (Mo. Rev. Stat. [1909] § 4903, 5115) it was proper in a murder case to give an instruction authorizing a conviction in the second degree although the evidence conclusively showed that the killing constituted murder in the first degree. So also in cases somewhat similar where there is no evidence tending to show the second degree of the offense. Campbell v. State, 185 Ala. 17, 64 So. 320 (1914); People v. Repke, supra; or where the defendant is arraigned only for a particular degree of homicide. Connell v. State, 46 Tex. Crim. Rep. 259, 81 S. W. 746 (1904). The rule is extended to the point of holding under the statutes, State v. Hopkirk, 84 Mo. 278 (1884), and even at common law, Regina v. Lee, 4 F. & F. 63 (N. P. 1864), that a homicide committed in the perpetration of a felony is murder whether or not there was any precedent intention of committing homicide, Washington v. State, 178 Ark. 1011, 28 S. W. (2d) 1055 (1930); State v. Best, 44 Wyo. 383, 12 P. (2d) 1110 (1932), premeditation, deliberation or malice not being essential to this crime. Cole v. State, 192 Ind. 29, 134 N. E. 867 (1922). And in such cases it has been said that it is not only the right, but the duty of the court to instruct the jury to find the defendant guilty of murder in the first degree or to acquit him. Fertig v. State, 100 Wis. 301, 75 N. W. 960 (1898).

The controversy in such cases arises from the diversity of opinion with regard to the function of the jury in passing upon and determining the degree of the offense. It is settled beyond any doubt that at common law it is the exclusive jurisdiction of the court to decide all questions of law and the correspondingly exclusive jurisdiction of the jury to decide all questions of fact. Rex v. The Dean of St. Asaph, 3 T. R. 428 (1784); Commonwealth v. Porter, 10 Metc. 263 (Mass. 1845); Commonwealth v. Anthes,
5 Gray 185 (Mass. 1855). And while it is true that the jury may disregard the instructions of the court, in some cases there being no remedy for this, still it is the right of the court at common law to instruct the jury on the law and the duty of the jury to obey the instructions. Sperf and Hausen v. United States, 156 U. S. 51 (1895).

Some courts refuse to recognize the exceptions to the general rule stated above, where the court has a right to instruct the jury to find the defendant guilty of murder in the first degree or acquit him, and hold that, however strong the evidence of deliberation and design may be, the jury alone has the power to find the fact, and may refuse to find it. State v. Dowd, 19 Conn. 388 (1849); State v. Phinney, 13 Idaho 307, 89 Pac. 634 (1907); People v. Seiler, 246 N. Y. 262, 158 N. E. 615 (1927). And this was one of the arguments stated by Lehman, J., in his dissenting opinion in the principal case, the tenor of his argument with respect to this point being that since it is the function of the jury to find the facts which will determine the degree of the offence, the judge cannot take that function away from them by a predetermination of the degree.

But the converse of this argument is even more forcefully stated in an elaborate opinion by Mr. Justice Harlan in Sperf and Hausen v. United States, supra, where he holds that, in cases where the evidence justifies the finding of a lower degree of an offense the jury may so find, but not so where the evidence does not admit of a lower degree. He further states: "Congress did not invest juries in criminal cases with power arbitrarily to disregard the evidence and principles of law applicable to the case on trial . . . , for the instructing or refusing to instruct rests on legal principles or presumptions which it is the province of the court to declare for the guidance of the jury". The principle in this case accords squarely with that enunciated in the principal case and is sustained by the great weight of authority.

J. C. P.

MUNICIPAL CORPORATIONS—Constitutional Limitation on Indebtedness.

This suit was brought by a tax-payer against the city to enjoin the officers thereof from borrowing money on short-term notes on the ground that the constitutional limitation of indebtedness would be exceeded. The lower court entered a verdict for the city which was affirmed by the supreme court. Held, that a portion of delinquent taxes were certain of collection and properly deductible from the total indebtedness of the city in computing the amount of indebtedness it might incur without the vote of the people. Ward v. City of Pittsburgh, — Pa. —, 184 Atl. 240 (1936).

Many measures designed to relieve current economic distress call for increased municipal expenditures. Among the obstacles which must be faced in making adequate financial provisions are the constitutional limitations on municipal indebtedness. One of the more popular devices used to avoid these constitutional restrictions is the anticipation of taxes by means of warrants. People v. May, 9 Colo. 80, 10 Pac. 641 (1886); Hartley v. Nash, 157 Ga. 402, 121 S. E. 295 (1924); Johnson v. Board of Commissioners of Pawnee County, 7 Okla. 686, 56 Pac. 701 (1899).

Since tax years usually do not coincide with budget years, current expenses must be incurred before income is received. This practical consideration has moved the courts to hold that expenses for the current year were not in-
cluded within the meaning of "indebtedness" if sufficient current revenues might be expected. Dively v. Cedar Rapids, 27 Iowa 227 (1869); Darling v. Taylor, 7 N. D. 538, 75 N. W. 166 (1898); Terrell v. Dessaint, 71 Tex. 770, 9 S. W. 593 (1888); cf. Blue Island State Bank v. McRae, 165 Ga. 153, 140 S. E. 351 (1927).

It was only a short step to say that warrants in anticipation of current taxes issued for current expenditures created no new debts. Swanson v. Ottumwa, 118 Iowa 161, 91 N. W. 1048 (1902); see French v. Burlington, 42 Iowa 614, 618 (1876).

Any constitutional objection to the anticipation of revenues beyond the current year for future expenses has been removed by a convenient formula. Although such taxes must be actually levied before they may be anticipated, once levied, the proceeds are said to be constructively in the treasury, offsetting the claims created by the warrants. Springfield v. Edwards, 84 Ill. 626 (1877); Rankin v. State Board of Examiners, 59 Mont. 557, 197 Pac. 988 (1921); Shannon v. Huron, 9 S. D. 356, 69 N. W. 598 (1896); cf. Ash v. Parkinson, 5 Nev. 15 (1869).

Although the power to anticipate revenues exists in most jurisdictions, each jurisdiction provides a limitation to the doctrine. In Colorado, any anticipation of the expected revenues in excess of the amount covered by the annual levy is illegal. People v. May, supra. The Illinois courts hold that the only revenues which can be anticipated are those accruing from the collection of taxes already levied or at least leviable for the current year. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610 (1904). In Kentucky a city may consider anticipated license taxes where adequate experience has demonstrated that the return therefrom has become stabilized. Const. Co. v. Kimbell, 230 Ky. 439, 20 S. W. (2d) 77 (1929) overruling Winchester v. Nelson, 175 Ky. 63, 193 S. W. 1040 (1917). The courts in North Dakota have decreed that taxes levied and uncollected are to be taken into consideration in determining whether the limit has been reached, but revenues to be derived from tax levies to be made in future years may not be considered. Anderson v. School Dist., 32 N. D. 413, 156 N. W. 54 (1915).

Despite the restrictions put upon tax anticipations in the majority of the states, Pennsylvania—the state of the principal case—and Washington have repeatedly adhered to a very liberal rule in determining the items to be considered as cash assets. They have held cash assets to include not only cash in the treasury and taxes for the current year, but unpaid delinquent taxes, which are to be regarded as available until the lien of the tax has been merged in the sale of the property. Consequently, until the time of sale these taxes are to be deducted in computing the city's indebtedness. Penn. Power & Light Co. v. Bethlehem, 323 Pa. 313, 185 Atl. 710 (1936); Mullen v. Sackett, 14 Wash. 100, 44 Pac. 136 (1896).

The majority of the jurisdictions have been unwilling to extend the rule of tax anticipation so as to include delinquent taxes among the items deductible from the city's total indebtedness. The courts favor tax anticipation, but restrict this anticipation to the issuance of tax warrants as assignments of taxes, holding that uncollected taxes for the current year cannot be anticipated by deducting their amounts from the total municipal indebtedness. See Council Bluffs v. Stewart, 51 Iowa 385, 396, 1 N. W. 628, 636 (1879). The reason for the courts' unwillingness to extend the rule as it was extended in the principal case is the possible impairment, or nullification of its spirit, or of the force of the constitutional limitation on indebtedness. French v. Burlington, supra. A better method than that of the hand-
to-mouth system of tax anticipation, and its ever present threat of unreasonable extension, would be to remove the necessity for anticipation by arranging that tax collections should approximately coincide with expenditures. *Matthews v. Chicago*, 342 Ill. 120, 174 N. E. 35 (1930); cf. *Stanley v. Jeffries*, 86 Mont. 114, 284 Pac. 134 (1929).

The only justification for the use of tax anticipation is the inflexibility of the constitutional debt restrictions. Proposed schemes for state administrative supervision might prove satisfactory.

D. G.

**NATIONAL BANKS—Double Liability of Stockholders.**

The stockholders of several Detroit banks transferred their shares to a holding company known as the Detroit Bankers Company. In exchange for their bank stock, they received shares in the holding company association whose profits were derived from the profits of the banks. The articles of association and each stock certificate issued by the company contained the provision that the holders of the corporation stock would be individually responsible for any statutory liability imposed on the corporation as owner of stock in any national bank. Upon failure of one of the banks in the group, the receiver sought to enforce the double liability provisions of the banking act against the shareholders of the holding company for the proportionate amount of their interest in the corporation. *Held*, the stockholders of the holding company are the actual owners of the bank stock and as such are liable for the assessment provided under the statutes. *Barbour v. Thomas*, 86 F. (2d) 510 (C. C. A. 6th, 1936).

A section of the National Banking Act, 38 Stat. 273 (1913), 12 U. S. C. A. § 64 (1926), provided that “stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such associations; each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock”. This has consistently been construed to mean that “the actual owner may be held although the stock has not been registered in his name”. *Forest v. Jack*, 294 U. S. 158 (1935); *Ohio Valley National Bank v. Hulitt*, 204 U. S. 162 (1907).

There is a growing tendency in the courts to look behind the corporate entity and regard the corporation as an association of persons, wherever the corporation “is used to defeat public convenience, justify wrong, protect crime . . .”. *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 255 (C. C. E. D. Wis. 1905); *Callas v. Independent Taxi Owners’ Ass’n*, 66 F. (2d) 192 (App. D. C. 1933); *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257 (1911); *Edward Finch Co. v. Robie*, 12 F. (2d) 360 (C. C. A. 8th, 1926). Determining the actual owner of national bank stock for purposes of assessment, so that a holding company may not defeat the purpose of the law, may be considered merely a phase of the broader trend.

There have been several cases almost directly in point, and in each case the court has invariably held that the owners of the holding company stock were liable for the assessment. In *Corker v. Soper*, 53 F. (2d) 190 (C. C. A. 5th, 1931), the court stated that it would look through the subterfuge of pretended ownership, because the corporation existed “as a mere creature organized and maintained for the purpose of holding, not really, but as agent”. The holding was the same in *Laurent v. Anderson*, 70 F. (2d) 819
(C. C. A. 6th, 1934), a case almost identical with the present one. O'Keefe v. Pearson, 73 F. (2d) 673 (C. C. A. 1st, 1934), differed only in that the holding company was called a "Trust Company" and the shares it issued were designated "Trust Certificates". The conclusions of the court were the same in Metropolitan Holding Co. v. Snyder, 79 F. (2d) 263 (C. C. A. 9th, 1935). This rule has been relegated to a position of merely historical interest by the provisions of § 64a of the Banking Act, 48 STAT. 189 (1933), 12 U. S. C. A. § 64a (Supp. 1936); which provides that double liability shall not apply to new bank stock issued after June 16, 1933, or for outstanding stock after July 1, 1937.

R. O'D.

PARTNERSHIPS—Continuation after Death of a Partner.

A member of a partnership, in which the individual income, withdrawal and other accounts of the two partners were kept separately, died in 1928. The surviving partner was appointed administrator of his estate. Tax returns and other evidence showed that the business of the partnership was continued for several years on the same basis as before, except that after 1930 the account of the deceased partner was carried in the name of his estate. The partnership had done business with the plaintiff corporation for many years. The corporation's claim was for goods sold to the partnership between August 1933 and June 1934. The corporation knew of the death of one of the partners but had made no inquiries as to the authority of the others to carry on the partnership business. There was no agreement of any kind to continue the partnership business in the event of the death of one partner. Upon the death of the second partner in 1934, an administrator de bonis non (of the estate of the first dying partner) was appointed. Held, that under the provisions of the Uniform Partnership Act the consent of the deceased partner's representative to the continuation of the partnership business acts as an assignment of the deceased partner's partnership credits to the creditors of the partnership who became such after the death of the partner; that the administrator of the deceased had power to give such consent for the continuation of the business by himself as surviving partner as would enable partnership creditors to recover on claims arising after the death of the deceased partner, and, since the interests of the administrators were conflicting, for the appointment of a receiver to wind up the partnership business. Blumer Brewing Corporation v. Mayer, — Wis. —, 269 N. W. 693 (1936).

The principal question to be decided was whether the surviving partner had the authority to continue the partnership business after the dissolution of the partnership by death. In general, a partnership business may be continued after the death of a partner under the following circumstances:

(1). If it is provided for under the partnership agreement. Burwell v. Mandeville's Executors, 2 How. 559 (U. S. 1844); Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160 (1889). Delaware will recognize a provision of this type in the partnership agreement but not in the will of the deceased partner. Del. Rev. Code (1915) § 2902.

(2). If it is so directed by the will of the deceased partner. Under this provision some states hold that even dissolution does not take place upon the death of a partner. Thompson v. Parnell, 81 Kan. 119, 105 Pac. 502 (1909);
Gratz v. Bayard, 11 S. & R. 41 (Pa. 1824). The weight of opinion is otherwise. Stewart v. Robinson, supra; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338 (1898); Andrews v. Stinson, 264 Ill. 111, 98 N. E. 222 (1912); Darcy v. Commissioner of Int. Rev., 66 F. (2d) 581 (C. C. A. 2d, 1933). Practically, whether or not there is dissolution, the important question would seem to be whether certain powers existed after the dissolution. Ohio provides by statute that where a partnership agreement (or a partner's will) makes provision for the disposition of the interest of the deceased partner, "such interest shall be settled and disposed of in accordance with the provisions of such articles or will". Ohio G. C. (1931) § 8092. (3). By agreement between the surviving partner and the legal representative of the deceased partner, provided the legal representative has been given such power by the will of the deceased. These provisions are usually permissive only, and not obligatory. The surviving partner is not obliged to carry on the business nor is the executor forced to subject himself to personal liability by becoming a partner. If the executor does not become a partner but merely leaves the firm assets in the business he will not become liable for the debts of the continued business. Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295 (1886)

It is to be noted in the present case that the administrator of the deceased partner did not attempt to become an active partner. All that he did was to allow the interest of the deceased partner to remain in the partnership business and thereafter be managed by himself as surviving partner. The estate in no sense became a partner and its liability was limited to the assets in the partnership business. The issue raised was determined under Wis. Stat. (1935) § 123.36 (2) corresponding to Uniform Partnership Act § 41 ¶ 5. The interest of the deceased in the partnership property was personality and the administrator had authority under common law to dispose of it and to pass good title without the order of the court. There was no Wisconsin Statute that abrogated the common law rule. Williams v. Cobb, 242 U. S. 307 (1916). The court in the present case did not need to consider to what extent the administrator would be personally liable, since, if he had the power to sell the partnership assets, he certainly had the power to consent to their retention in the partnership business. There was no intention on the part of the framers of the Uniform Partnership Act to affect or enlarge the rights and powers of administrators in any way. Section 41 of the Act merely protects creditors and defines their rights. The interest of the deceased partner remaining in the business is subject to claims against the partnership before and after the death of the deceased partner. In any event it would seem that where the power to impose liability is limited to the amount invested by the decedent in the firm, there arises in effect a non-statutory limited partnership of which the survivors are general partners and the estate a special partner.

The present case is the usual type of situation where the deceased partner's share has been allowed to remain in the partnership business. As long as the business is conducted successfully, no questions are raised, the heirs and administrator of the deceased partner being satisfied to let conditions remain as they are. But when the enterprise shows a loss the many problems inherent to dissolution arise.

Here the heirs of the decedent knew that part of his estate was kept in the business after his death. They had ready access to a court for application for the winding up of the partnership business. The question of estoppel was not decided but the court intimated that the equities of the heirs were
at least weakened. And since the interests of the two administrators were conflicting, it was held a receiver should be appointed to wind up the affairs of the partnership business.

E. J. D.

REAL PROPERTY—Navigable Waters—Right of State to Grant Foreshore.

Actions were brought, in partition, to determine the title to certain premises situated between the high and low-water marks along Rockaway Beach in the City of New York. These premises, having been previously conveyed by the defendant State of New York to the defendant City of New York, were filled in by the grantee for the purpose of establishing a public health beach, and the water which formerly covered the beach was excluded therefrom. The complaint alleged, in substance, that neither of the defendants had title to or any interest in the property, but that title thereto was vested in the other parties to these actions by virtue of a certain colonial grant made to their predecessor in title. Held, colonial grant to private persons by the lieutenant-governor, attempting to convey 11 miles of foreshore constituting the entire ocean front of Borough of Queens, which was for neither commercial nor governmental purposes, was void because contrary to public policy. Marba Sea Bay Corporation v. Clinton Street Realty Corporation, et al., Arverne-By-The-Sea Co. v. Amerman et al., Boardwalk Development Co., Inc. v. July Development Co., Inc., et al. 284 N. Y. Supp. 59 (2d. Dep't 1936).

The precise extent of the State's power over its submerged lands is a question concerning which there has been much diversity of opinion in this country, and even within the state of New York alone. In the case of People v. Steeplechase Park Co., 218 N. Y. 459, 113 N. E. 521 (1916) the court said: "In this country the state has succeeded to all the rights of both Crown and Parliament in the navigable waters and the soil under them, and here the jus privatum and the jus publicum are both vested in the state."

As a general proposition title to tide lands is in the state and can be conveyed. Sullivan v. Callvert, 27 Wash. 600, 63 Pac. 363 (1902); Taylor v. Commonwealth, 102 Va. 759, 47 S. E. 875 (1904); City of Oakland v. Oakland Water Co., 118 Cal. 160, 50 Pac. 277 (1897); Muckle v. Good, 45 Ore. 230, 77 Pac. 743 (1904). Thus, in Jones v. Oember, 110 Ga. 202, 35 S. E. 375 (1900), it was said that there could be no question that the state owned the beds of all water within its jurisdiction, and with the power to grant, sell or lease it for any portion thereof to any of its citizens, upon terms or conditions which its legislature might prescribe, to the same extent that it would have the right to dispose of its wild or other lands.

While this proposition is laid down in the cases heretofore cited, in broad and unrestricted terms, it must be understood with the qualification that the right of the state is subject to the provisions of the Constitution giving Congress control over waters upon which foreign and interstate navigation is conducted. Judson v. Tide Water Lumber Co., 51 Wash. 164, 98 Pac. 877 (1908); Providence v. Comstock, 27 R. I. 537, 65 Atl. 307 (1906); Shepard's Point Land Co. v. Atlantic Hotel, 132 N. C. 517, 44 S. E. 39 (1903). In a few earlier cases the courts attempted to impose a trust in favor of the public upon the state's title to tide lands, thereby, to some extent at least, restricting the right of the state to grant the same. People

The trend of the recent cases indicates that grants of land under navigable waters, whether tidal or non-tidal, depending upon the view of the particular jurisdiction as to the proper test of navigability, are subject to the restriction that the grant must be for the public benefit, or at least not injurious to the public interest. Forestier v. Johnson, 104 Cal. 24, 127 Pac. 156 (1912); State v. Gerbing, 56 Fla. 603, 47 So. 353 (1908); Pacific Elevator Co. v. Port Land, 65 Ore. 349, 133 Pac. 72 (1913); Illinois Central R. R. v. Illinois, 173 Ill. 471, 50 N. E. 1104 (1898).

The state may grant the fee of its shores of tide water to a municipality in furtherance of the public interest. Mobile Transp. Co. v. City of Mobile, 128 Ala. 335, 30 So. 645 (1908). A town may obtain title from the government to the flats, and even to the channel of tide waters. Coolidge v. Williams, 4 Mass. 140 (1808). The state has the right to make the grant, and the municipality has the capacity to receive it.

Delegation by the state to municipalities of the right to administer public waters in proximity to municipalities may be accomplished either by granting the right to make harbor improvements without conveyance of legal title in land or by grant subject to public trust. Newcomb v. City of Newport Beach, — Cal. —, 60 P. (2d) 825 (1936).

However, in some states the legislature is held to be without power to grant the bed of a navigable river to a municipal corporation. Northern Pacific R. R. Co. v. Hirtzel, 29 Idaho 438, 161 Pac. 854 (1916). Where land under water is owned by a town or city by virtue of a grant to it by the state or other sovereign power, it holds title in trust for the public use; Long Beach v. Lisenby, 175 Cal. 575, 166 Pac. 333 (1917); In re New York, 182 N. Y. 361, 75 N. E. 156 (1905); and subject to the public rights of navigation, Santa Cruz v. Southern R. R. Co., 163 Cal. 588, 126 Pac. 362 (1912).

From the history of the foreshore, thus briefly reviewed, it may be stated that: (a) the *fus privatum* was in the crown; (b) title to the foreshore was *prima facie* in the crown; and (c) a grant of land upon a river or sound extended only to the high-water mark.

R. P. N.

STATUTES—Construction of Penal Statute.

The plaintiff's automobile was being operated with plaintiff's consent by an unlicensed driver at the time of the collision. A state statute provides: "No person shall operate a motor vehicle upon any way in this state unless licensed . . . or permit such a vehicle owned or controlled by him to be so operated by a person not so licensed . . ." N. H. Pub. Laws (1926) c. 101, § 9. Penalties are imposed for violation of the statute. Upon proof that the plaintiff believed, without express inquiry as to the fact, that the driver did have a license, the trial court transferred, prior to trial, the question whether the plaintiff was precluded from recovering against the allegedly negligent defendant. *Held*, that the owner was not precluded from recovering against the negligent third person where she reasonably believed that her driver was licensed. *Bowdler v. St. Johnsbury Trucking Co., et al*, — N. H. —, 189 Atl. 353 (1937).

In the case of *Johnson v. Boston & M. R. Co.*, 83 N. H. 350, 143 Atl. 516 (1928), the New Hampshire court had asserted that an unlicensed driver is
a trespasser upon the highway and is precluded from recovering for injuries where he is involved in a collision. In the principal case the court was faced with the problem of deciding whether or not to extend this doctrine to the owner of an automobile in the hands of an unlicensed driver other than the owner, but one who is operating the car with the owner's consent.

The question certified called upon the court to decide whether the reasonable belief of the plaintiff was the test in determining liability under the statute. Whether scienter or intent is a necessary element of a statutory crime is a problem of statutory construction, requiring judicial inquiry into the legislative purpose. In general, there are four factors to be considered.

The first factor is the principle known as the "strict construction of a penal statute"; and, although a civil liability is involved in the present case, such liability, if there is to be any, must arise out of the violation of a penal statute. The rule that a penal statute must be strictly construed has in a measure been relaxed. Where, for example, the statute expresses a strong public policy or embraces a broad public interest, although it be penal, it ought to receive an equitable construction. *Tyner v. United States*, 23 App. D. C. 324 (1904); *Deloria v. Atkins*, 158 Mich. 282, 122 N. W. 559 (1909); *McInerney v. United States*, 143 Fed. 729 (C. C. A. 1st, 1906) *semble*.

Such a construction, as defined by Lord Coke, "... is one made by the judges that cases out of the letter of the statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth, and the reason thereof is, for that the lawmakers could not possibly set down all cases in express terms". 1 Co. Inst. *24 b.* It is suggested in the dissent to the majority opinion in the principal case that the equity of the statute should have been applied.

The second factor to be considered is the relation of the common law to the statute involved. The general rule is that a statute in derogation of the common law must be strictly construed. *Heaney v. Borough of Mauch Chunk*, 322 Pa. 487, 185 Atl. 732 (1936). Insofar as the present statute might be construed to impose a liability without fault, if the "trespasser on the highway" doctrine obtained, it is opposed to the common law concept of liability. *Morris v. Platt*, 32 Conn. 75 (1864); *Aaron v. State*, 31 Ga. 167 (1860). On the other hand, it is equally true that the courts will examine a statute to find remedies which the common law did not provide. *Jonas v. Dunkelberg*, *Iowa* ——, 265 N. W. 157 (1936).

The third factor is the actual wording of the statute. The word "permit" does not have a clear or precise definition. Generally, it has one of two significations, one being where the mind consents to the act; the other where the mind does not affirmatively agree, but having the right and the means to interfere, fails to do so. *Dorris v. McKamy*, 40 Cal. App. 267, 180 Pac. 645, 649 (1919); *Warberton v. Woods*, 6 Mo. 17 (1839). Accord: *People v. Decker Co.*, 180 App. Div. 615, 619, 167 N. Y. Supp. 958 (Sup. Ct. 1917). But see *In re Thomas*, 103 Fed. 272, 274 (D. C. W. D. Pa. 1900), where Chief Justice Allen, in his dissent, refuses to accept such an arbitrary test of lack of knowledge of an unlicensed status. "Some inquiry", he says, "is demanded. In ignorance of the status, the owner may not rightly be excused for inaction and indifference. If the duty to inquire is performed, the right to permit is given."

The fourth factor, the legislative history of the subject matter, determines what the duty to inquire shall be. The state law provides that an operator have his certificate of license upon his person. *N. H. Pub. Laws* (1926) c. 101, §16. It is suggested by the dissenting judge in the principal case that
the license requirement correlates with the statute under discussion and that the purpose of this statute is to establish a "... specific rule of conduct in place of a generalized standard ...". It is admitted that a civil duty not to permit an unlicensed person to drive does exist. "It being illegal to permit an unlicensed person to drive and a means of ascertainment being pointed out by the statutory arrow, it seems a disregard of the statute to hold that it does not direct that the means be employed." Bowdler v. St. Johnsbury Trucking Co., et al, supra, 189 Atl. at 358.

To attempt to place the owner under an absolute liability would undoubtedly extend the doctrine of liability too far. To place no more than the common law liability upon him would give no effect to the statute. Therefore, it is submitted that a duty higher than the civil duty must be impressed. The owner should be required to demand that a would-be operator produce his permit before he grants to him permission to operate his automobile upon the highways. Perhaps it would be enough to exact of the owner the duty of inquiring as to the existence of the operator's permit. Such duty having been satisfied, the court might well refuse to read into the statute the stricter liability imposed under the "trespasser on the highway" doctrine.

S. B.

SURETYSHIP—Depository Bond—Obligation as Terminated by Death.

On July 22, 1924, a national bank of Kingwood, West Virginia, was designated by a bankruptcy court as depository for funds of bankrupt estates, subject to requirement that they give a bond in the penal sum of five thousand dollars. The bond was given and signed by two sureties, as obligors, declaring their heirs, executors, administrators and successors, jointly and severally bound. One of the sureties died in 1926. His widow had never sought to revoke suretyship, and when the bank failed in 1931 the United States, on behalf of a trustee in bankruptcy, sought to recover against her as executrix of the deceased surety's estate. Held, the obligation of an individual surety on a bond of a designated depository for money of bankrupt estates is a continuing guaranty, irrevocable by the guarantor and not terminable by death. United States v. Chain, — U. S. ——, 81 L. ed. 313 (1937).

In many cases it has been held that notice of the acceptance of the guaranty by the third party is necessary and is deemed essential to the inception of the contract. Douglass v. Reynolds, 7 Pet. 113 (U. S. 1833); Louisville Mfg. Co. v. Welch, 10 How. 461 (U. S. 1850); Wilcox v. Draper, 12 Neb. 138, 10 N. W. 579 (1881). When not supported by present consideration the guaranty amounts to an offer and there is not a contract until acted upon and it remains an offer terminable by death or revocation. Davis Sewing Machine Co. v. Richards, 115 U. S. 524 (1885); Jordan v. Dobbins, 122 Mass. 168 (1877). But this doctrine is inapplicable where the agreement to accept was contemporaneous with the guaranty and constituted part of the consideration and basis thereof. Davis v. Wells, 104 U. S. 159 (1881); Wildes v. Savage, 1 Story 22, Fed. Cas. 17,653 (1839); Milroy v. Quinn, 69 Ind. 406 (1879); Thompson v. Glover, 78 Ky. 193 (1879); Menard v. Scudder, 7 La. Ann. 385 (1852). However, to constitute good consideration it is not necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made
and is an inducement to the transaction. *Violett v. Patton*, 5 Cranch 142 (U. S. 1809); *McDonald v. Magruder*, 3 Pet. 470 (U. S. 1830). Designation of a bank as depository was present, adequate and indivisible consideration. *Lloyd's v. Harper*, L. R. 16 Ch. Div. 290 (1879); *In re Crace*, 1 Cas. Ch. 733 (1902). In *Lloyd's v. Harper*, supra, one of the most famous and often cited cases on the subject of suretyship, the son was an underwriting member in Lloyd's of London. His father wrote to the managing committee of underwriters that he would be responsible for all engagements made by his son in the capacity of underwriter. The court in rendering its decision held that a guaranty, the consideration for which is given once and for all, cannot be terminated by the guarantor, and does not cease on his death. However, in a case where the consideration is not whole and indivisible but passes at different times, the guaranty is revocable by death. *American Chain Co. v. Arrow Grip Mfg. Co.*, 134 Misc. 321, 235 N. Y. Supp. 228 (Sup. Ct. 1929).

If the surety wishes to limit his liability to terminate on death he must so stipulate in the bond, and in the absence of such stipulation there is absolute liability irrevocable by death. *Gordon v. Calvert*, 2 Sim. 253 (V. C. 1828); *In re Crace*, supra. Though in a case where stock was sold on a personal guaranty that the dividends would be paid, and the vendee bought in reliance thereon, the court in *Kernochan v. Murray*, 42 Hun 660 (N. Y. 1886) held that it was a personal guaranty and unenforceable against the deceased guarantor's legal representatives. But it is to be noted that this was later reversed in an appeal (111 N. Y. 306, 18 N. E. 868 [1888]), the court saying that a guaranty, by one selling stock, that the purchaser shall receive dividends thereon equal to a certain percentage and that he will make good any deficiency, is not terminated by guarantor's death unless so expressed in the bond.

By a long line of cases similar to the principal case it has been held that the surety's or guarantor's representatives would be liable for his obligation. *Moore v. Wallis*, 18 Ala. 458 (1850); *Hecht v. Skaggs*, 53 Ark. 291, 13 S. W. 930 (1890); *Green v. Young*, 8 Greenl. 14 (Me. 1831). Liability of surety on a bond by which he binds himself after his death becomes and remains the liability of his estate. *In re Sullard*, 114 Misc. 288, 186 N. Y. Supp. 251 (Surr. Ct. 1921); *In re Hughes' Estate*, 13 Pa. Super. 240 (1900); *Donnerberg v. Oppenheimer*, 15 Wash, 290, 46 Pac. 254 (1896). In such an event the bond is enforced against the legal representative just as if it were in fact his obligation. *Powell v. Kettlelle*, 6 Ill. 191 (1844). Even in the case where the estate is distributed by the executor and a decree is obtained on a bond upon which execution is issued and returned nulla bona, a court of equity will entertain a bill against the legal representatives, heirs, and legatees of deceased. *Moore v. Wallis*, supra; *Thompson v. Brown*, 4 Johns. Ch. 619 (N. Y. 1820). But it has been held in New York that the bond is enforceable against the estate only when the surety received some benefit. *Carpenter v. Provoost*, 4 N. Y. Super. Ct. 537 (1849). This cannot be said to be the majority rule. Furthermore, an action may be maintained against deceased's estate without first obtaining judgment on the bond where the damages arising from breach are admitted by demurrer and the only question remaining is as to who (if anyone) is liable. *Williams v. McNair*, 98 N. C. 322, 4 S. E. 131 (1887); *McNeill v. McBryde*, 112 N. C. 408, 16 S. E. 841 (1893); *Finch v. State*, 71 Tex. 52, 9 S. W. 85 (1888).

As to the question whether there is a guaranty as to funds deposited after the death of the guarantor, the recent case of *United States v. Robson*, 9 F.
Supp. 446 (S. D. W. Va. 1935) held that as to such depositor there was no guaranty. However, the court in citing precedent included cases involving notice to the depositor, either actual or constructive. The better rule seems to be in keeping with the Supreme Court rule stated by Justice Van-Devanter in the principal case. *Hecht v. Weaver*, 34 Fed. 111 (C. D. Ore. 1888); *Pond v. United States*, 111 Fed. 989 (C. A. 9th, 1901); *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241 (1888). The death of a surety on a bond of an officer of the United States to secure the faithful performance of duties does not relieve his estate from liability accruing subsequent to death but before the office expired. *Hecht v. Weaver*, supra; *Pond v. United States*, supra; *Mowbray v. State*, 88 Ind. 324 (1882). Nevertheless, it has been held that where there is more than one surety, the estate is released. *Holthausen v. Kells*, 18 App. Div. 80, 45 N. Y. Supp. 471 (2d Dep't 1897), *aff'd* 54 N. Y. 776, 49 N. E. 1098 (1898).

When the party guaranteed has notice of the guarantor's death, the guaranty ceases, as such person cannot be said to have acted at the request of a dead man. *Valentine v. Donohoe-Kelly Baking Co.*, 133 Cal. 191, 65 Pac. 381 (1901); *Gay v. Ward*, 67 Conn. 147, 54 Atl. 1025 (1895); *Jordan v. Dobbins*, supra. But the death of the guarantor does not defeat the creditor's right to indemnification for advances in good faith after death and without knowledge thereof. *Menard v. Scudder*, supra. The case of *In re Lorch's Estate*, 284 Pa. 500, 131 Atl. 381 (1925) held that notice of the surety's death, published in a newspaper, was constructive notice sufficient to end suretyship, but this is not the majority rule. While ordinarily notice would end the liability, the heirs or successors of a deceased guarantor may extend the guarantee and waive its expiration. *Buckeye Cotton Oil Co. v. Ahrheim*, 168 La. 139, 121 So. 602 (1929); *American Chain Co. v. Arrow Grip Mfg. Co.*, supra. But when the surety has been replaced after death, no liability remains in his representatives. *In re Lilienthal's Estate*, 136 Misc. 762, 240 N. Y. Supp. 849 (Surr. Ct. 1930).

TORTS—Right of Way as Affected by Duty of Common Carrier.

The plaintiff was injured in the District of Columbia while riding as a passenger for hire in a taxicab owned by the defendants as joint adventurers, the taxicab being driven for them by an agent. The taxicab was proceeding in an easterly direction towards an intersection at the same time that another car, proceeding northerly, approaching the same intersection. A collision resulted and the passenger sustained serious injuries. Although the evidence was conflicting as to the relative speed of the two cars and as to which car reached the intersection first, the defendants grounded their defense upon the contention that the taxicab had the right of way. *Held*, where one of two cars approaching an intersection is a common carrier which, as such, owes a duty not merely to the driver of the other car, but also to its own passenger, the duty of the common carrier to its passenger is paramount to the right of the common carrier to pursue its right of way in respect to the other car. *Francis v. Fitzpatrick*, —— App. D. C. ——, 65 Wash. L. R. 248 (1937).

It has been consistently held that the operator of a vehicle, although he may be entitled to the right of way at an intersection, must nevertheless act in such manner as a reasonable and prudent man would under similar circumstances with knowledge that he had the right of way. The exercise of
that right in the face of apparent danger constitutes negligence. *Rosenberg v. Matulis*, 116 Conn. 675, 166 Atl. 397 (1933); *Upton v. Bell Cabs*, —— La. App. ——, 154 So. 359 (1934); *Houghton v. Baillargeon*, 51 R. I. 475, 167 Atl. 115 (1933). On the other hand it is equally well settled that a taxicab holding itself out to serve those applying for transportation for hire is a common carrier, and that as such it owes the highest degree of care towards its passengers. In view of this established doctrine it is clear that the right of way concept of reasonable care applicable to the operators of non-passenger carrying vehicles does not apply in a case which involves a suit by a passenger against the owners of a taxicab for the alleged negligence of the taxicab driver in failing to exercise the highest degree of care while crossing an intersection. In such case it is apparent that if the violation of the common carrier's duty to its passenger is established by the evidence, its negligence cannot be excused or refuted by the mere claim that it was observing the law of the road. *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105 (1917). In the case of *Washington v. Seattle*, 170 Wash. 371, 16 P. (2d) 597 (1932) the court has correctly stated the rule: "The bus driver's negligence, if any, as between him and his passenger is to be measured by his duty as a common carrier, not by his duty to other users of the road."

The decision in the principal case does not present a novel extension of the rule that a common carrier owes to its passengers the highest degree of care, but is merely illustrative of the general trend of decisions with respect to collisions involving common carriers at street intersections. The courts have frequently held that in view of the duty owing to its passengers, a common carrier must sacrifice its right of way in favor of another vehicle approaching an intersection at a fast rate of speed, or at approximately the same time, so as to avoid a collision which might result in injury to its passengers. *Zimmer v. Third Ave. R. R.*, 36 App. Div. 265, 53 N. Y. Supp. 308 (2d Dep't 1899); *Hogan v. Miller*, 156 Va. 166, 157 S. E. 540 (1918); *McDorman v. Dunn*, 101 Wash. 120, 172 Pac. 244 (1918). In *Zimmer v. Third Ave. R. R., supra*, where a passenger in a horse car received injuries as the result of a collision between it and a cable car the court held that the horse car company was not relieved of liability by the fact that its car had the right of way and that if the driver of the horse car saw that the cable car was proceeding in violation of his priority, he was bound to sacrifice his right of way rather than jeopardize his passengers.

J. L. H.

**TRUSTS—Constructive Trusts and Debt.**

A bankrupt corporation, for whom defendant in this case was trustee in bankruptcy, maintained an employee's welfare association to provide life, health and accident insurance for its employees. The association, though unincorporated, had its own officers and maintained its own bank account. The payments which were required to be made by the employees were taken care of through deductions from their wages, these deductions being made by the bankrupt, which then paid such sums over to the association. No money was actually set aside from the pay envelopes, the transaction being wholly a bookkeeping entry whereby the employee was charged and the association credited with the amount due. Nor was the association paid from any particular bank account of the bankrupt, withdrawals for this purpose being
made from a number of different accounts. Beginning in February, 1933, defendant fell into arrears in its payments, and remained so until receivers were appointed in November of that year. In August, 1933, the assets of the welfare association were transferred to another unincorporated association in which the bankrupt and the employees had equal representation. Plaintiff was appointed trustee to enforce the claim against the bankrupt, his theory being that defendant was a constructive trustee of the money due. *Held*, the relation between the bankrupt and the association was that of debtor and creditor, there being no trust fund or res, and the default was not a breach of trust but mere failure to pay a debt. *McKee v. Paradise*, 299 U. S. 119 (1936).

A trust may not be declared by the court unless the property interest which the defendant unjustly holds is adequately identified, a specific res which the court may say is held by the defendant for the benefit of someone else. 1 Bogert, *Trusts and Trustees*, (1935) 111. Therefore even where money is a trust fund itself, if it becomes a part of the general assets of the trustee, losing its character as a specific fund, a trust cannot be declared on a portion of those general assets. *National City Bank v. Hotchkiss*, 231 U. S. 50 (1913); *Hirning v. Federal Reserve Bank*, 52 F. (2d) 382 (C. C. A. 8th, 1931).

While it is said that a mere refusal to perform a promise will not make a person guilty of breach of trust, *Southwick v. Spevak*, 252 Mass. 342, 147 N. E. 885 (1925), a promise may be the declaration of a party that he holds property as a trustee. So where a company owed money on notes, and in acknowledging the debt, enumerated various amounts payable to it by debtors and said that upon collection of these they would be applied to payment of the notes, the moneys collected were held to be trust funds held for the benefit of the bank. *St. Louis Union Trust Co. v. Wabash C. & W. R. Co.*, 258 Ill. App. 9 (1930).

The cases involving bank deposits are the best analogies to the instant case. It is the general rule that the relation between a depositor and his bank is one in which the depositor stands as a creditor of the bank. *Manhattan Co. v. Blake*, 148 U. S. 412 (1893); *Baylor v. American Trust & Savings Bank*, 157 Ill. 62, 41 N. E. 622 (1895). Therefore, when a bank fails, a depositor stands on equal footing with other depositors and creditors of the bank and may not trace his particular funds in such a way that a trust will be declared. *City of Sturgis v. Meade County Bank*, 38 S. D. 317, 161 N. W. 327 (1917). This latter case points out certain well-known exceptions to the rule: "First, where money or other thing is deposited with the understanding that that particular money or thing is to be returned to the depositor; second, where the money or thing deposited is to be used for a specifically designated purpose; and third, where the deposit itself was wrongful or unlawful". So, where a sum of money was deposited for the express payment of a mortgage note, the bank was not a creditor of the depositor, but a trustee for the mortgagee. *Titlow v. Sundquist*, 234 Fed. 613 (C. C. A. 9th, 1913).

The court in the principal case points out, and the facts clearly show, that there was no fund upon which a trust could be impressed. The money was never actually set aside into a fund for the benefit of the welfare association, and the deduction from the pay envelopes was wholly a bookkeeping entry. Nor would an assignment have been effectual to this end, as it would have been a mere change of the party creditor. Had there been a nova-
tion, whereby the bankrupt acknowledged that the deductions from the wages were to be paid over to the association out of the fund kept for that purpose, a trust would have existed. Restatement, Trusts (1935) § 12.

E. J. Q. Jr.

TRUSTS—Right of Creditors in a School Endowment Fund.

The Morristown School Foundation, a New Jersey corporation, had been in operation for several years when, in 1917, it became apparent that an income in addition to tuition fees received would be necessary in order that the school might properly function. Accordingly provision was made for the establishment of a permanent endowment fund, the income from which was to be used for school purposes. Among the gifts received was a donation of stock from Cornelius Crane. The income from these gifts was to be used for the purposes of the foundation. In 1932 a creditor of the school applied for and secured the appointment of a receiver, the school corporation consenting. A trustee for the creditors was appointed. Simultaneously the Alumni incorporated for the purpose of organizing and operating a boys' boarding and day school in Morristown. The federal court authorized its receiver to convey the school property, including the endowment fund, to the trustee, and the receiver was discharged. The petitioners' original bill sought to recover the stock donated by Mr. Crane on the theory that the trust had failed. This theory was abandoned, however, and the lower court held that the Crane gift should pass to the Alumni Association as successor to the school corporation, but that the remainder of the endowment fund should be devoted to the payment of the school's creditors. Upon an appeal taken by the trustee, held, that the entire endowment fund should be held and administered by the Alumni as successor or substituted trustee for the school corporation, the creditors of the school having no right or interest in such a fund. Crane et al. v. Morristown School Foundation, 120 N. J. Eq. 583, 187 Atl. 632 (1936).

In this case an endowment fund was set up, the income of which was to be used for school purposes. The subscribers knew and understood that their gifts were to be preserved in a separate fund yielding an income to be used only for educational purposes. Such gifts, devises and bequests in trust for educational purposes are good public, charitable trusts, and they will be supported and preserved by the courts of equity. Richards v. Wilson, 185 Ind. 335, 112 N. E. 780 (1916). The fact that the students attending the Morristown School Foundation paid tuition fees does not remove the endowment fund in question from the class of charitable trusts. Taylor's Executors v. Trustees of Bryn Mawr College, 34 N. J. Eq. 101 (1881); Butterworth v. Keeler, 219 N. Y. 446, 114 N. E. 803 (1916).

Where there is a specific trust, failure of the trust cannot be averted or its fruits otherwise applied by recourse to the cy pres doctrine, which does not apply in the case of a specific trust. Trustees of Cumberland University v. Caldwell, 203 Ala. 590, 84 So. 846 (1920); Bowden v. Brown, 200 Mass. 269, 86 N. E. 351 (1908). In the case at hand, however, the donors of the endowment intended to foster and aid education in the community generally, and the failure of the school corporation involved was not permitted to defeat their purpose. Where a gift for charitable uses can no longer be administered in exact accordance with the intention of the donor, the courts have power under the general equity jurisdiction to direct that the gift be administered cy pres, that is, as nearly as possible in conformity with the intention of
the donor. *In re Young Women's Christian Association*, 96 N. J. Eq. 568, 126 Atl. 610 (1924); *Snow v. President and Trustees of Bowdoin College*, 133 Me. 195, 175 Atl. 268 (1934).

The facts in the case at hand clearly distinguish it from *Magie v. The German Evangelical Dutch Church of Newark*, 13 N. J. Eq. 77 (1860), which held that corporations may not purchase and hold real estate under trusts of their own creation, the trust being established to place the property so purchased beyond the reach of their creditors. Where parties by means of their own devising attempt to place their own property beyond the reach of their creditors, the rights of the creditors are not thereby prejudiced. *Bernardsville Methodist Episcopal Church v. Seney*, 85 N. J. Eq. 271, 96 Atl. 388 (1915). In the case at hand the endowment fund was created voluntarily by the free gifts of the donees for the purpose of fostering and aiding education in the community. Where property is given to a corporation in trust for a charitable use, the trust is the creature of the donor, and cannot be defeated by the donee. The donor may impose upon the gift such character, conditions and qualifications as he may see fit, conformably with public policy. The property being a gift, and being held in a separate fund, only the income of which is available to the corporation, no wrong is done to the creditors of the corporation when the court of equity protects and enforces all the conditions of the gift. *Magie v. The German Evangelical Dutch Church of Newark*, supra; *Bernardsville Methodist Episcopal Church v. Seney*, supra. Neither the receiver nor the Alumni, but the boys for whose benefit the endowment fund was created, have the real beneficial interest in the fund. It was for them that the fund was created. The creditors show no right either in law or in equity to such a trust fund. *In Richards v. Wilson*, supra, 112 N. E. at 799 the court said: "What has been said necessarily answers much of the brief of appellant creditors. Their reliance was placed first on the proposition that the Winona Technical Institute at Indianapolis, their debtor, was the beneficiary of the donations, and as such was the owner of the property purchased with the donations and as such owner liable for the debt due appellants as any other debtor is liable. This contention fails with the conclusion reached as to the relation of their debtor, The Winona Technical Institute, to the property. The gift was not to that corporation, but to those whom its use of the property was designed to benefit." Had the trust failed for the want of beneficiaries the creditors of the school could not benefit from the donor's money placed in trust and limited to the use of the income for the use of a school that became insolvent and hence could not function. In that event (the trust being specific), the trust *res* must have reverted to the settlors.

While it is unfortunate that the school corporation's creditors must suffer, the rule laid down in the instant case is not harsh. Indeed the rule is upheld by good reason and the whole theory of charitable trusts. The gifts composing the endowment fund were given freely for a specific purpose to a definite fund, set aside from the ordinary property of the school corporation. The corporation had no right to the endowment fund; no control, beyond that of custodian, was exercised. The income from the fund, however, went to the school corporation for its use in the educational field. If the corporation could not use the principal directly, it certainly should not be permitted to frustrate the purpose and intention of the donors by using the principal indirectly, that is, by allowing its creditors to take it in satisfaction for the corporation's debts. And the creditors, having at least constructive notice of these circumstances, can show no reliance on such a fund as
security. The real beneficiaries, the boys of the community, should not be deprived of the benefits which the donors of the fund intended to secure to them. Upon the failure of the school corporate, the court quite properly applied the fund to a cognate purpose, the new school organized by the Alumni.

E. J. F.


Two bills in equity were brought to restrain the collection of a tax levied under the provisions of the Massachusetts Unemployment Compensation Law, Mass. Stat. 1935, c. 479, as amended by Stat. 1936, cc. 12, 249, and to restrain the State of Massachusetts from payment of the funds collected under the tax, in accordance with the terms of the statute, to the Federal Social Security Board for credit in the Unemployment Trust Fund. 49 Stat. 640 (1935), 42 U. S. C. A. § 1104 (Supp. 1936). Held, both the State and the Federal Acts are constitutional. Howes Brothers Co. v. Massachusetts Unemployment Compensation Commission, —— Mass. ——, 5 N. E. (2d) 720 (1936).

The questions presented in this case for the decision of the Supreme Judicial Court of Massachusetts involve the broadest police power principles of state and national government. May a state, in the exercise of its police power, pass a law requiring specified employers and employees to contribute to a fund from which employees, in a time of unemployment, shall be paid? Is the power exercised here a valid exercise of state police power, which "extends . . . not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity"? Eubank v. Richmond, 226 U. S. 137, 142 (1912).

The very wording of the statute negatives any idea of defense on the ground that it falls within the state taxing power. The taxes are called "contributions". Howes Brothers Co. v. Massachusetts Unemployment Compensation Commission, supra, at 725. Hence the regulatory power if the state may immediately be questioned, and for this reason the court did not hesitate to allow the plaintiff standing in court to challenge the validity of the statute. Id.

The decision in Chamberlin v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22 (1936) aff'd per curiam, 299 U. S. —— (1936), (1937) 25 Georgetown Law Journal 467, involved the constitutionality of a New York statute framed, as is the Massachusetts act, to comply with the terms of the Social Security Act, 49 Stat. 620 (1935), 42 U. S. C. A. §§ 301-1305 (Supp. 1936). The New York law was upheld as a valid exercise of the state police power. The court, relying principally upon the reasoning adopted in Nebbia v. New York, 291 U. S. 502 (1934), found that the act in no way violated the due process clause of the Fourteenth Amendment. The fact that the New York case was affirmed by an equally divided Supreme Court is sufficient indication that the present case will also be upheld; and since in the hearing and decision on the New York case Mr. Justice Stone was absent, the probability is strengthened that an opinion will be forthcoming which will affirm the principles enunciated by Chief Justice Rugg of Massachusetts in the principal case. A recent decision in Alabama, Beeland Wholesale Co. v. Kaufman, —— Ala. —— (Mar. 18, 1937), has upheld a similar act in that state, while a decision of the
Circuit Court of Appeals for the fifth circuit, *Steward Machine Co. v. Davis*, — F. (2d) — (March 20, 1937), has upheld the Federal Act under the taxing power of Congress. But see *Gulf State Paper Co. v. Carmichael*, — Ala. — (1937), in which the classification taxing employers of eight or more was held to violate the equal protection clause of the Fourteenth Amendment. This last decision is probably unsound. *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571 (1915); *La Belle Iron Works v. United States*, 256 U. S. 377 (1921).

The reasoning in the recently decided case of *West Coast Hotel Co. v. Parrish*, — U. S. — (1937) is highly important in its application to the whole problem of state legislation of the type involved in the Massachusetts Unemployment Compensation Act, *supra*. "We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law making power to correct the abuse which springs from their selfish disregard of the public interest." Although the language above was directed towards a minimum wage statute, its applicability in the present situation is obvious. As Chief Justice Rugg points out: "[The] design [of the Massachusetts Act] is to afford relief to those who have been employed in the selected kinds of business . . . when they are thrown out of work through no fault of their own. . . . Relief of the physical needs of the unemployed who are without resources of their own is manifestly a duty of government. . . . There has been a widespread belief that a public exigency due to unemployment existed. . . . The solution put forward after deliberation is the law here assailed." *Howes Brothers Co. v. Massachusetts Unemployment Commission*, *supra*, at 725. And further: "The Unemployment Compensation Law was enacted in view of the extent of unemployment accompanying the change in economic conditions beginning in 1929. Of that change courts 'may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country'*. *Atchison, Topeka & Santa Fe Ry. v. United States*, 284 U. S. 248, 260." *Id.* at 729. It seems on the face of it that Justice Rugg has come close to the kernel of the whole matter when he insists, in language almost paralleling that used by Chief Justice Hughes in the *West Coast Hotel case*, *supra*, that changing economic conditions are in themselves facts which alter, in the effect of their application, the ordinarily unalterable principles of our system of constitutional jurisprudence.

The state police power is one of "The most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government". *District of Columbia v. Brooke*, 214 U. S. 138, 149 (1909). Admitting that state unemployment insurance statutes are regulatory in effect, even though they may be dressed in the guise of taxes, the question which naturally arises is whether the regulation is one in a field "in respect of which there is a power of legislative regulation". *United States v. Butler*, 297 U. S. 1, 61 (1936). The effect of the Massachusetts statute is to appropriate the money of employer and employee for the benefit of both groups, the fact being (in theory at least) that in times of depression both employee and employer will be benefited by the less abrupt decline in purchasing power which will result when the benefit payments act as stop gaps for loss of wage income. In the principal case the court points to much state legislation that
has been upheld as valid, although its effect was the deprivation of some right which was previously thought to be constitutionally inviolable. Thus workmen's compensation acts have been upheld, though they added an extra burden on the employer and were passed primarily to benefit the employee. New York C. R. R. v. White, 243 U. S. 188 (1917); Mountain Timber Co. v. Washington, 243 U. S. 219 (1917). State regulation of fire insurance rates has been upheld. German Alliance Insurance Co. v. Lewis, 233 U. S. 389 (1914). State bank deposit insurance legislation has been upheld, although a pooling principle similar to that involved in the unemployment insurance statutes in effect required sound banks to pay for the unsound practices or judgments of others. Noble State Bank v. Haskell, 219 U. S. 104 (1911). Though the "mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation", Tyson v. Banton, 273 U. S. 418, 451 (1927), it does not follow that if the legislature moves in an untried or novel direction its act is essentially bad "... the legislature is primarily the judge of the necessity of such an enactment, ... every possible presumption is in favor of its validity, and ... though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." Nebbia v. New York, supra, at 538 (1934).

Though the principal case discussed at length the validity of the Federal Social Security Act, supra, the decision seems to miss the major constitutional issue which is raised by the portions of the Act under fire by the plaintiffs. Is it so coercive on the states that in effect the non-acceptance of its provisions amounts to a penalty? Child Labor Tax case (Bailey v. Drexel Furniture Co.), 259 U. S. 20 (1922); Chicago Board of Trade Case (Hill v. Wallace), 259 U. S. 44 (1922); Carter v. Carter Coal Co., 298 U. S. 238 (1936). Florida v. Mellon, 273 U. S. 12 (1927) upheld a credit plan in the Revenue Act of 1926, involving the Federal Estate Tax, 44 Stat. 70 (1926), 26 U. S. C. A. § 413 (b) (Supp. 1936). Carter v. Carter Coal Co., supra, invalidated a strikingly similar credit (this time called a "drawback") plan in the Guffey Coal Act, 49 Stat. 991 (1935) on the ground that the whole scheme was a penalty, a regulation in a field in which Congress had no power to regulate. "... the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power." Bailey v. Drexel Furniture Co., supra, at 43. Since the Social Security Act has a tax, with a credit plan hinged on the contingency of state enactment of approved legislation, the penalty problem is paramount.

It seems that the decision in the principal case is sound in so far as it related to the state act under consideration, which can be sustained as a valid exercise of local police power. But on the subject of the Federal Act it is doubtful in the first place if the plaintiffs have properly a standing in court to question the validity of the Act, Frothingham v. Mellon, 262 U. S. 447 (1923), and in the second place whether, having given them a standing, the court has properly considered all the ramifications of the Federal Act, or of the previous majority opinions in some of the recent cases decided by the Supreme Court. See (1936) Note 25 GEORGETOWN LAW JOURNAL 161. Precedent seems to indicate that a taxpayer or a state would have no standing in court to challenge the Federal Act, Massachusetts & Frothingham v. Mellon, supra; see Note (1936) 24 GEORGETOWN LAW JOURNAL 974. It
would further seem to be clear that even if the standing in court be granted a taxpayer who resists the exaction "as a step in an unauthorized plan", United States v. Butler, 297 U. S. 1, 58 (1936) (and the decision in the Butler case seems greatly to curtail the effect of the Frothingham decision), he should be unable to force the Court to inquire into the motives behind the seemingly valid exercise of the taxing power, United States v. Doremus, 249 U. S. 86 (1919). However, the plaintiffs may be able to persuade the Court that it should take jurisdiction, and should probe into the motives behind the legislation. It would then probably find that Congress has effectively attempted to coerce the states into passing legislation which gives Congress direct control over state unemployment insurance legislation. The coercive effect would be shown by reading together Title III, 49 STAT. 626, 42 U. S. C. A. §§ 501-503 (Supp. 1936) and Title IX, id at 639, 42 U. S. C. A. §§ 1101-1109 (Supp. 1936) of the Social Security Act. It is difficult to see how the Court could, in the face of the Harrison Drug Act, 38 STAT. 785 (1914), 26 U. S. C. A. §§ 1040-1054, 1383-1391 (Supp. 1936) United States v. Jin Fuey Moy, 241 U. S. 394 (1916); United States v. Doremus, supra; United States v. Balint, 258 U. S. 250 (1922); Linder v. United States, 268 U. S. 5 (1925), and other cases, Vezzie Bank v. Fenno, 8 Wall. 533 (U. S. 1869); Spencer v. Merchant, 125 U. S. 945 (1888); McCray v. United States, 195 U. S. 27 (1904); Arizona v. California, 283 U. S. 423 (1931), look behind the face of the statute, but some recent cases indicate that this is at least a possibility. Railroad Retirement Board v. Alton R. R., 295 U. S. 330 (1935); United States v. Butler, supra; Carter v. Carter Coal Co., supra; but see Jones-Loughlin Steel Corp. v. National Labor Relations Board; Freuhauf Trailer Co. v. Same; etc., —— U. S. —— (April 12, 1987), which may limit the effect of Carter v. Carter Coal Co., supra.

J. N. S. JR.

WILLS—Exclusion of Testamentary Libel.

The decedent left a duly executed will which, however, contained libelous matter. The executor offered the will for probate, but added to the usual prayer of the petition a request that the defamatory language be excluded from probate, since it "is neither dispositive nor an essential testamentary provision." Held, that the Surrogate's Court was authorized to exclude from the will the alleged libelous matter, since, being a nondispositive statement, it was not properly a part of the will. In re Draske's Will, —— Misc. ——, 290 N. Y. Supp. 581 (Surr. Ct. 1936).

Generally, the courts display a definite reluctance to strike out a portion of a will. Nevertheless, it has been done on various grounds. A will may be established in part and disallowed in part, the court giving effect to those parts of the document which speak the will of the testator, and excluding the defective portions. Allison v. Smith, 16 Mich. 405 (1868). Where part of a will has been inserted through fraud or inadvertence, it may be rejected and probate granted of the remainder, so long as the two parts are severable. Rhodes v. Rhodes, 7 App. Cas. 192 (1882).

If undue influence makes a section of a will invalid, that section may be omitted, and the rest admitted to probate. Old Colony Trust Co. v. Bailey, 202 Mass. 283, 88 N. E. 898 (1909). A part of a will which is nondispositive may be omitted from probate for sufficient reasons, as where it discloses military secrets. In the Estate of Heywood, 114 L. T. R. 375 (1915). The simple fact that a clause is non-dispositive as in the case of an appointment
of a guardian, is not sufficient reason to strike it out. In re Meyer, 72 Misc. 566, 181 N. Y. Supp. 27 (Surr. Ct. 1911).

The weight of the limited authority on the point presented by the principal case appears to be that defamatory matter contained in a will, so long as it is not dispositive, should be refused probate. In re Wartnaby, 1 Rob. Ecc. 423 (1846). "A will is an instrument which disposes of one's property, to take effect after death, and should not be permitted to be made a vehicle for libel or contumely; and when such design clearly appears from the context, such matter, in so far as it is not dispositive, should be refused probate and record." In re Bomar's Will, --- Misc. ---, 18 N. Y. Supp. 214, 215 (Surr. Ct. 1892).

The will in Curtis v. Curtis, 3 Add. Ecc. 33 (1825) read: "I leave all property of every kind to my sister Mary, in consequence of the cruel and murderous conduct of my wife in this illness, as well as in past instances". The court, when a motion was made to strike out the offensive words exclusive of the dispositive part, refused, saying: "We do not have authority to strike out or expunge any part of a will written by a testator, propria manu, upon a mere verbal application like the present, we are therefore compelled unwillingly to withhold assent to the proposition made on the part of the wife." In contradistinction to this case, on application by the executor to strike out words, not testamentary but slanderous and defamatory of the wife, an order was granted omitting the words from probate. A will must not be the medium for slanderous and libelous statements of a testator concerning other persons. In the Goods of Robert White, 111 L. T. R. 697 (1927).

In another English case, words which defamed a living individual were refused probate, but certain objectionable religious views in the will were admitted. In the Estate of Caie, 43 T. L. R. 697 (1927). Certain language claimed to be objectionable to the contestants was omitted because it was not dispositive, but appeared to have been added by the testator or draftsman in explanation of the substitution of a new trustee in place of one previously appointed in the will. In re Speiden's Estate, 128 Misc. 899, 221 N. Y. Supp. 223 (Surr. Ct. 1926). Again in Goods of Honywood, L. R. 2 P. & D. (1871) Lord Penzance affirmed the authority of the court to strike out a libelous nondispositive passage, but indicated that it was a power to be exercised with great caution and therefore refused to strike out the "angry expressions of a disappointed litigant", declaring that it would be a great misfortune if the court on such trivial grounds should put before the public under its seal a document which purported to be, but actually was not, a true copy of the will. Even if the Surrogate has power to refuse probate to a will because it contains scandalous matter, that power should be sparingly used. In re Meyer, supra.

The liability of the estate for testamentary libel may be considered. In the case of Gallagher's Estate, 10 Pa. Dist. R. 733 (1900), an attorney at law was permitted to put in a claim against the testator's estate on account of a libel contained in the will. It was observed in this case that the maxim "actio personalis moritur cum persona" did not apply, since no cause of action existed before the death of the testator, and that the libel was a deliberate attempt to perpetuate defamation by means of the public record. This reasoning is also followed in Harris et al. v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1913).

On the other hand, a libel for which damages may be recovered, as defined in the Ga. Civ. Code (1910) § 4428, must not only be "expressed in print,
or writing, or pictures, or signs”, but must be published. The absence of either of these essentials precludes recovery. If there should be a printing, and the author dies, the maxim “actio personalis moritur cum persona” will apply, with the result that what has been done is ineffectual to constitute a substantive wrong. If a paper executed as a will expresses libelous matter, and the act of the executor in propounding the will is relied on to complete the offense and afford ground for recovery against the estate, such reliance must fail, because the testator has died. If it be said that the act of the executor in propounding the will could be taken into account, the reply is, that the executor was a creature or agency of the law to administer the estate, and was not representative of the person of the testator. *Citizens’ & Southern Nat. Bank v. Hendricks*, 176 Ga. 692, 168 S. E. 925 (1933).

There can be no quarrel with the decision in the principal case. To state the proposition that a testator is entitled to the aid of the processes of the law in perpetuating malice is to answer it. Action seasonably taken by an executor will prevent such an undesirable result as was reached in *Citizens’ & Southern Nat. Bank v. Hendricks*, supra: leaving a person libeled, yet completely without remedy.

I. J. K.

WILLS—Lapse of Void Devises—Residuary Clauses—Intestacy.

Wilmer Worth died, leaving the residue of his estate, including any legacies that might have lapsed or failed, to a church and three other institutions. Since the will was executed less than one calendar month before the death of the testator, the bequest to the church was invalidated by the District of Columbia Code, Title 29, § 42. From an order of the lower court instructing the executor of the estate, two of the residuary legatees appealed. *Held*, that the void legacy to the church did not inure to the benefit of the other residuary legatees, but that the testator died intestate as to that bequest. *The George Washington University and The American University v. The Riggs National Bank of Washington, D. C., Executor, —— App. D. C. ——*, 65 Wash. L. Rep. 170 (Feb. 1937).

The question presented in this case has been the subject of extended judicial discussion, but it had not been decided previously in the District of Columbia. It is a well established rule of the English common law that, on the death or disqualification of one of several residuary legatees (who do not take jointly or as members of a class), his share goes, not to the others, but to whomever would have inherited the property in case no will had been made. Unless a contrary intention appears, such lapsed portion of the residuary estate is thus removed from the operation of the residuary clause and passes, as upon intestacy, to the heirs or distributees. This doctrine, predicated upon the proposition that residuary legatees take as tenants in common without a right of survivorship, has been sustained by the overwhelming weight of American authority. *Crum v. Bliss*, 47 Conn. 592 (1880); *Dorsey v. Dobson*, 203 Ill. 32, 67 N. E. 395 (1903); *Crocker v. Crocker*, 230 Mass. 478, 120 N. E. 110 (1918); *Vreeland v. Van Ryper*, 17 N. J. Eq. 133 (1864); *Beekman v. Bonsor*, 23 N. Y. 298 (1861).

In a number of cases the courts, while recognizing the rule, have expressed their dissatisfaction with it. Thus in *Wright v. Wright*, 225 N. Y. 329, 122 N. E. 213 (1919), holding that where a general residuary clause contained several different provisions dividing the residue of the testator’s estate among different institutions, the last clause, providing that the residue
and remainder of one-third part of the estate shall be given to a certain corporation, did not carry a lapsed portion of another legacy, the court said: "On failure of the intended legacy of part of the residuum, the part as to which disposition has failed will go as in case of intestacy, and the residuum passing under the residuary clause will not be augmented by a 'residue of a residue'. The reason for this distinction in most cases is neither very apparent, satisfactory, nor convincing. The one most often given is based on the assumption that it could not have been the intent of the testator, in disposing of his residuary estate, that a bequest of the residue thereof should be augmented."

_Corbett v. Skaggs_, 111 Kan. 380, 207 Pac. 819 (1922), probably the most forceful and convincing case representing the minority view, definitely repudiates the rule. In a well-reasoned opinion in which all of his associates concurred, Mason, J. held that the share of a residuary legatee, who dies without issue before the death of the testator, passes to the surviving residuaries in the absence of an express stipulation to the contrary. The doctrine that such share shall be disposed of as in the case of intestacy was rejected as being in conflict with the established policy of the court to ascertain and give effect to the actual intention of the maker of the will. Although the desired result could have been attained without such a far reaching and definite commitment, the Kansas court preferred to rest its decision upon the general principle rather than upon the exceptional features of the particular case. Indiana has also sustained the proposition that surviving residuary legatees or devisees take the share of a residuary legatee or devisee who predeceases the testator or for some other reason is disqualified. _Gray v. Bailey_, 42 Ind. 349 (1873); _West v. West_, 89 Ind. 529 (1883).

It is perhaps significant that several states have abrogated the harshness of the common law rule by statute. Pennsylvania steadfastly adhered to it until 1917, when an amendment was enacted which expressly provided that where a bequest shall fail or shall be revoked, it shall pass to and be divided among the remaining residuary legatees.

Although the decision in the principal case accords with accepted views on the question involved, it does not commend itself to sound reasoning. It is a sacrifice of the settled presumption that a testator does not mean to die intestate as to any portion of his estate, and also of his demonstrably plain intent, shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution at all. Any contemplated change in the common law rule lies outside the province of the court, however, and is a proper subject for legislative action.

J. L. S., Jr.

In his introduction, Attorney General Cummings makes it clear that despite its title, "this volume is not a lawbook. Nor, on the other hand, is it a popularized description of the Department of Justice or of racketeers, lawsuits, prisons and politics."¹ Neither is it a propaganda tract nor an apologia for the New Deal in the Department of Justice. It is, on the contrary, one of the most scholarly contributions to the literature of national history that has come from the pens of public officers.

With fine scholarship, painstaking research and in a thoroughly readable style, the authors have unfolded a picture of American history from a new point of view. The history of the office of Attorney General, possibly more than any other, is intimately and inextricably interwoven with the history of all three branches of our government. Consequently, here is rich material for the lawyer, historian, and political scientist alike.

For the practitioner as well as the law student, Messrs. Cummings and McFarland have presented hitherto unavailable information from the files and records of the Department of Justice and other sources, which sheds much light upon the shadowy backgrounds behind such landmark cases as Marbury v. Madison ² and McCulloch v. Maryland,³ which brought the Federalist dispute to issue; Ableman v. Booth,⁴ Dred Scott v. Sandford,⁵ Ex parte Merryman,⁶ Ex parte Milligan,⁷ Ex parte Garland,⁸ Mississippi v. Johnson,⁹ Georgia v. Stanton,¹⁰ United States v. Reese,¹¹ United States v. Cruikshank,¹² Civil Rights Cases,¹³ Ex

† Attorney General of the United States.
‡ Assistant Attorney General of the United States.
¹ P. v.
² 1 Cranch 137 (1803).
³ 4 Wheat. 316 (1819).
⁴ 21 How. 506 (1859).
⁵ 19 How. 393 (1857).
⁷ 4 Wall. 2 (1866).
⁸ 4 Wall. 333 (1867).
⁹ 4 Wall. 475 (1867).
¹⁰ 6 Wall. 50 (1867).
¹¹ 92 U. S. 214 (1876).
¹² 92 U. S. 542 (1876).
¹³ 109 U. S. 3 (1883).
parte Yarbrough, and Strauder v. West Virginia, causes arising out of slavery, civil war, and reconstruction; then later, the celebrated controversies that sprang from the Sherman Act, like the Pipe case, the Northern Securities case, the Swift case, the Standard Oil and Tobacco cases; as well as the great "labor" cases, Holy Trinity Church v. United States, In re Debs, Adair v. United States, the Employers' Liability cases, United Mine Workers v. Coronado Coal Co., and Wilson v. New. In this latter group it is to be regretted, however, that such scant mention is made of the more recent cases of Railroad Retirement Board v. Alton Railroad, the Schechter case, and Carter v. Carter Coal Company, for surely these authors could have written luminously of them.

For the student of United States history the book presents in colorful outline much new factual material concerning epochal events and struggles. There is discussed the problems which culminated in the Whiskey Insurrection of 1794, the delicate task of preserving the neutrality policy of this country in the European Wars of 1792, the enforcement of the Alien and Sedition Laws at the end of the 19th century, the suppression of the Burr conspiracy, the enforcement of the Embargo and Non-intercourse Acts, and the prosecution of the flood of prize cases which came in the wake of the War of 1812. A chapter on Taney and the Monster treats adequately of the conflict over the Bank of the United States and nicely supplements such detailed accounts as Professor Swisher's.

The book gives an absorbing account of the Attorney General in the role of defender and protector of the public domain. Liti-

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14 110 U. S. 651 (1884).
15 110 U. S. 393 (1880).
17 Northern Securities Co. v. United States, 193 U. S. 197 (1904).
19 Standard Oil Co. v. United States, 221 U. S. 1 (1911).
21 143 U. S. 457 (1892).
22 168 U. S. 564 (1895).
23 208 U. S. 161 (1908).
24 Employers' Liability cases, 207 U. S. 463 (1908); Second Employers' Liability cases, 223 U. S. 1 (1912).
25 259 U. S. 344 (1922).
26 243 U. S. 332 (1917).
29 299 U. S. 495 (1936).
30 Swisher, Roger B. Taney (1935) cc. ix-xvi.
gation and private claims to empires following the Louisiana Purchase and the accessions of the Floridas and of California, occupied the office for three-fourths of a century, and the story is one of bitter struggles, spurious claims, forged evidence and corrupt officials. A later chapter recounts the adventures of the nefarious Credit Mobilier and the seizure of the public domain, including valuable timber and mineral lands as Pasture for the Iron Horse, and still another on the abuses and frauds used by private interests to seize the forests of the West while the government under Gifford Pinchot sought to establish a conservation program.

Three chapters are devoted to slavery, civil war and reconstruction problems, followed by a history of the difficulties of the administration of justice in the territories of the "Wild West", and detailed accounts of the Government's war against monopolies, first against the telephone and telegraph patentees, and later in the "trust-busting" era under the Sherman and Clayton Acts.

The student of government could ardently wish that such a book might be written of each of the major government departments by such responsible authors. Beginning with the origin of the office of Attorney General in England, through the Crown Counsels of the Colonies, Federal Justice traces the slow, halting evolution of the modern Department of Justice from the one-man department, it was, when Edmund Randolph became the chief law officer of the Republic.

Richard Rush, appointed by Madison, was the first Attorney General who was willing to reside at the capital. The salary of the post was so meagre that the incumbents invariably found it necessary to engage in private practice. Again as William Wirt put it when first offered the appointment, "What is there in the rough, unbuilt, hot and desolate hills of Washington, or in its winter rains, mud, turbulence and wrangling that could compensate me for all those pure pleasures of heart that I should lose in such a vicinity?" 31

When Wirt finally did accept the office from President Monroe in 1817, he reported there was not to be found "any trace of a pen indicating in the slightest manner any one act of advice or opinion which had been given by any one of my predecessors from the first foundation of the federal government to the moment of my inquiry." 32

Wirt was the first Attorney General to preserve copies of official opinions and records of other transactions of his office,

31 P. 74.
32 P. 79.
and it was from such beginnings that this great governmental office grew.

There is an enlightening exposition of the Department of Justice as it is today—what its duties are, how it functions and how its manifold activities are classified and divided into sub-departments. The history of the Bureau of Prisons and of the tortuous growth of the Bureau of Identification is told in two informative chapters of unfailing interest.

Though suitable for evening reading, there is no attempt at clever phraseology throughout the entire book. Without becoming sensational, the "inside facts", supported by ample citations, are set forth simply and without color or prejudice. It is a scholarly piece of work, accurately annotated, with a biographical note listing the primary and secondary sources consulted, and a good index.

One puts the book down with regret that such gifted pens did not feel free to expand further the rich material they have here collected. As it is, Federal Justice will stand on the same shelves with such standard works as Beveridge’s Life of John Marshall and Warren’s Congress, the Constitution and the Supreme Court.

OSCAR A. PROVOST.*


This translation of Ehrlich’s notable contribution to legal literature appears as Volume V of the Harvard Studies in Jurisprudence. The original work was published in 1913. Its translation into English marks the close of the first quarter of a century since its publication. During that period Ehrlich’s influence upon American thought has been very considerable, largely due to the teaching of Roscoe Pound, the outstanding sociological jurist of the day. It is eminently fitting that the Introduction to this volume should be written by the distinguished former Dean of the Harvard Law School.

In his Foreword,¹ Ehrlich epitomizes his sociological approach to law in a single sentence: “At the present as well as at any

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* Member of the bar of the Supreme Court of the United States, of the District of Columbia, and of Montana; Former assistant attorney general of Montana.
† Late Professor of Roman Law in the University of Czernowitz.
‡ Professor of Law, The George Washington University Law School.
¹ P. xv.
other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.” This, to him, embodies the “fundamental principles of the sociology of law”. Dean Pound says that “The significant feature of Ehrlich’s thinking is in its looking at the legal order, at the ordering of relations which make up the legal order, at the body of norms of conduct and at particular legal precepts functionally, and in marking the limited function of the norm for decision.”

The basic presupposition of Ehrlich’s teaching is that no government could long survive which relied for its support solely upon law. The vital force of law lies not in legal propositions but in legal institutions. Possession, for instance, is merely one aspect of an economic system. Legal propositions are juristic creations, derived from the norms used for decisions, while the immediate basis of the legal order is usage, relations of domination, relations of possession and other facts of law. A legal system is something more than the result of practical legal activity terminating in a series of legal propositions. The structural perfection of the legal system is the work of jurists.

Ehrlich is a realist. The relation between the legal norm and the legal relation he seeks by observing life. He scoffs at the court which wastes its energies in defining a railroad because after reading the definition repeatedly one finds that it has not added to one’s knowledge. Who is there who has not seen and does not know a railroad by observation? A juristic concept without relation to life is unthinkable because it is devoid of empirical content. In life there are no abstract joint debtors. Life only can teach a glossator the content of a right. To Ehrlich the future of juristic science depends upon discarding for all time the mummary of abstract concepts. He believed that the mastery of insight is given only to him who has a genius for the concrete.

2 P. xxxii.
3 P. 56.
4 P. 84; p. 474.
5 P. 99.
6 P. 174.
7 P. 192.
8 P. 268.
9 P. 301.
10 P. 303.
11 P. 304.
12 P. 313.
14 P. 465.
Had Ehrlich lived in America in 1937, the administration forces would doubtless have called upon him to testify, before the Senate Judiciary Committee, on the reorganization of the Supreme Court. In his own words, his testimony would be:

"The law changes because men and things change. The gulf that is fixed between the legal order of the Middle Ages and that of the modern period, vast though it may seem to us, owes its existence to the accumulation of minute changes, the significance of which probably not one of their contemporaries surmised. And every change in the relation of power necessarily effects a change in the social norms that obtain. All legal development, therefore, is based upon the development of society, and the development of society consists in this, that men and their relations change in the course of time. The great never-ending task of juristic science is to resolve the conflict between the changing demands of life and the words of the established law."

After Ehrlich had finished his testimony, it is likely that some conservative of the opposition would interrogate the great realist thus: "Mr. Ehrlich, is it not true that practically all of your life has been spent as Professor of Roman Law at the University of Czernowitz?" And when Ehrlich answered "It is true", the blind conservative would probably chuckle with glee that he had stigmatized the witness as "academic".

Ehrlich's study of life, present and past, gave him his breadth of vision. His heart was deeply stirred by the activities of the Historical School. For their achievements, which to him were unsurpassed, he had an unqualified admiration, in spite of the fact that he was not uncritical of some of the theories of Puchta and Savigny who erred in their belief that it was the legal propositions which live in the consciousness of the people when in fact it is only from legal institutions and legal norms that legal propositions are deduced. But Ehrlich himself has been criticized for identifying living law with custom, which is not law, but only a condition of law at most. The validity of the criticism may at least be doubted to the extent that custom may operate within the forms of law and supply its content. Certainly in New York, prior to 1930, the customary practices of men in taking title to real property in the name of a corporation which they controlled, was more vital to the welfare of their widows than was their right of dower.

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15 P. 392.
16 P. 393.
17 P. 394.
18 P. 396.
19 P. 402.
20 P. 442.
21 COHEN, LAW AND THE SOCIAL ORDER (1933) 293.
22 P. 456.
The profession will be grateful to Dr. Moll for making available in English this fascinating volume. He brought to his task a resourceful scholarship. His aim was to present a faithful rendition of Ehrlich's thought, without attempting to achieve literary elegance. Yet, it is seldom in legal literature that a reader is borne so exaltingly to the heights of eloquence as Ehrlich bears one, through the words of his translator:

"The day of the Continental common law juristic science is done. The Civil Code for the German Empire has driven it out of its last place of refuge, and no power in the world will be able to restore its glory that has passed away. Whatsoever of value its labors of more than two thousand years have produced must be preserved for the future by the sociological science of law. But the latter will not be a juristic science. The deathless function of all juristic science, however, i.e., to make the law subserve the ever changing, ever new needs of life, will remain. No code will be able to destroy it."

This excerpt is representative of the superior quality of the translator's work. The translation is a literary achievement which will lure many a reader to an appreciation of Ehrlich.

HERBERT D. LAUBE.*


This is a reference book for the use of corporate officers and lawyers in handling routine corporate affairs such as holding stockholders' and directors' meetings, drafting resolutions and other corporate papers, the transfer of securities and the keeping of corporate records. A corporate manual or form book is very useful to lawyers who are retained to supervise the routine practice and to prepare resolutions and other papers needed by corporations in their ordinary activities. It is obvious that the value of such a book must be judged primarily on the forms it contains. Approximately one-half of the contents of the book consists of forms, including notices, minutes of meetings, resolutions, and specimen corporate records. The forms are printed in the body of the text in the chapters dealing with specific legal questions under consideration rather than as an appendix. This style of treatment should help to counteract the tendency to follow forms blindly without due consideration of the legal principles involved.

23 P. xii.
24 P. 339.
* Professor of Law, The Cornell University Law School.
† Author of CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS (1929).
‡ Member of the New York Bar.
On the theory expressed by the authors in their Preface that
“A general understanding of the legal principles on which corporate
activity is based is essential to the proper conduct of corporate affairs,” 1
the book is designed to be not only a form book and corporate
practice guide, but also a reference book on the legal principles
of corporation law. When an author attempts to cover the sub-
stantive law of corporations in a form book or manual for the
benefit of secretaries and employees who are not lawyers, there
is always a possibility that the law as presented may appear over
simplified with the resulting danger that the layman may mis-
takenly regard the book as an infallible adviser on legal questions,
and this may have unfortunate consequences. Perhaps it is recog-
nition of this possibility which leads the authors to state:

“In venturing, within the limits of one volume, into the substantive
law of corporations, the authors realize the danger of including state-
ments that appear dogmatic. They have, therefore, made a conscientious
effort to indicate whether the principles have been firmly established,
whether the courts are in disagreement, or whether the specific question
raised has not been the subject of judicial opinion”. 2

The book might perhaps have included a fuller discussion of
the provisions of the Federal Securities Act. 3 In considering the
issuance of corporate securities, the authors have only stated that “. . . before new offerings of securities may be made to
the public through the mails or through the channels of interstate
commerce, the securities, with certain exceptions, should be
registered with the Securities and Exchange Commission in
Washington”. 4 It may be that the workings of this Act have not,
in the opinion of the compilers of this manual, reached that com-
pleteness of demonstration which would bring them within the
borders of a practical manual meant to be an authoritative guide
for general secretarial use.

The most valuable parts of the book are those dealing with the
proper corporate practice to be followed in transferring securi-
ties, keeping records, and holding meetings. In this respect, it is
an improvement upon other books of this nature that I have had
the opportunity to examine.

MARTIN CONBOY.*

1 P. v.
2 P. v.
4 P. 708.
* Member of the Bar of New York; sometime United States Attorney for
the Southern District of New York; member of the Board of Regents,
Georgetown University.
BOOK REVIEWS 1075


CORPORATE REORGANIZATIONS—by John Gerdes.‡ Callaghan and Company, Chicago, 1936. 3 volumes.

These two works, both published in 1936, are worth while additions to the literature available in connection with the far-reaching amendments to the National Bankruptcy Act, enacted in 1933 and 1934.

For a long time practitioners had realized the need both of a statutory method of treating bankrupt corporations, and, as well, of more liberality and flexibility in the Bankruptcy Act in its application to individual debtors. Just when Congressional action was despaired of, the depression brought an end to the inertia of our national legislature, and the legislation which is the subject of the above-entitled books resulted.

Judge Johnson's work is a compact, practical treatment in one volume of the law and procedure in bankruptcy reorganizations, including real estate, corporate and railroad reorganizations as well as extensions and compositions under Section 74 of the Bankruptcy Act. The arrangement of the book bespeaks the logic of the judicial mind. The first chapter deals with business and real estate reorganization, tracing the development of the equity receivership practice and showing the need of the reorganization amendments. In Chapter 2, the author paraphrases the provisions of Sections 74, 77, and 77B, and the applicable provisions of the general Act.

There follow chapters on jurisdiction, "good faith", petition and venue, extension or composition proceedings, administrative control, judicial administration, executory contracts and rent claims, classifying claims, set-off rights, submission and confirmation of plan, administrative fees and expenses, liquidation, appeals, and credit and collection problems.

Finally, in Chapter 18, the author gives appropriate forms starting with the debtor's petition under each of the sections and winding up with the debtor's report and account. The forms comprise substantially one-third of the volume. They have been

† Former United States District Judge in Illinois; present Federal Court Master in Chancery; and member of the Chicago Bar.
‡ Professor of Law, New York University, School of Law; Chairman of the National Bankruptcy Conference Committee; adviser on Restatement of the Law of Business Associations of the American Law Institute; and member of the New York Bar.

carefully selected and will be found to be invaluable to the practitioner.

In the Preface to his work, Professor Gerdes has stated as his purpose to supply the profession with a comprehensive treatise on the law and practice of proceedings under Section 77B. He deplores the fact that, prior to the enactment of that law, practitioners in the field of equity receiverships had to rely upon their own office memoranda, aided somewhat by fragments of the law or procedure to be found in works on receivers and on mortgage foreclosures, in law review articles, and in a series of lectures delivered before the members of the Association of the Bar of the City of New York in 1916 and 1927.

Inasmuch as some of the law and procedure in Section 77B was developed in the equity receivership practice, the author has drawn extensively on the material in that field. As some of the law and procedure was derived from bankruptcy, he has not hesitated to dig deeply in that field. Since some of the law and procedure is novel, the author has treated more than 12,000 cases, some of them unreported.

It has been well said that none of the amendments to the National Bankruptcy Act can be understood unless they are read, line for line, against their background. Professor Gerdes has fully appreciated that fact, and accordingly, has produced no ordinary work, but a great treatise on a most complex branch of the law.

Other features of the work will appeal to the busy practitioner: there will be found a carefully prepared table of contents, a full list of pertinent articles from law periodicals (classified and keyed to the chapter headings), a table of statutory references, a table of references to general orders in bankruptcy, a table of references to court rules, a table of cases, and an adequate index. Not the least valuable feature is the pocket insert to each volume designed to keep the citations and references up to date.

Comprehensive as it is, Professor Gerdes' work does not include a list of forms to assist the busy practitioner. The author explains that the preparation of permanent forms could not be undertaken with any degree of success "until the United States Supreme Court has promulgated General Orders in Bankruptcy fully covering proceedings under Section 77B and until local courts have fixed practice and procedure through the adoption of rules".² It would seem that now is the appropriate time for the issuance of a supplement with such forms.

² Preface, pp. iii, iv.
The writer has had occasion almost from the date of issuance of the work to test its practicability and usefulness, as well as to compare it with the other recognized services in this new field, and has found it more than satisfactory.

The relative merits of Judge Johnson's and Professor Gerdes' works must be left to the profession. Both works are mines of information; both do credit to the scholarship of the authors. Undoubtedly both will prove lasting and invaluable aids to the bar and to the teaching profession.

Donald L. Stumpf.*


While this work is primarily a study in American history, it has a very special interest for students of the law. Judge Ives ranks high as a scholar of early colonial times, but he has also, fortunately, a philosophical bent which enables him to understand the legal and constitutional implications of the events narrated by him.

The Ark and the Dove, then, is of course a careful account from secondary and archival sources of the Maryland settlement of 1634, its origins and its sequel down to the making of the American Constitution. The first Lord Baltimore is accurately placed in his English milieu as a member of the King's Privy Council, and a man of wide diplomatic experience. His first abortive attempts at a settlement at Avalon (Newfoundland), his hostile reception from the colonists of Virginia whither he went in search of a milder climate, and the final triumphant establishment of the Maryland Proprietary under Leonard Calvert, younger brother of the second Lord Baltimore (who never saw his colony), are minutely narrated from the original sources.

All this is history. But a most important part of the book is taken up with a study of the contribution made by Maryland to the development of civic liberty in the New World. This contribution, Judge Ives ably demonstrates, is much wider than is

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* Compare Judge Johnson's discussion on disclosure of creditor lists (C. 7, § 292, p. 264) with that of Professor Gerdes (Volume II, c. 20, § 992, pp. 1593-5).


‡ Member of the Bar of Connecticut; former Judge of the Danbury City Court.

commonly supposed. Ordinarily, Maryland is dismissed as the forerunner of religious liberty here; but while this is in itself a tremendous claim to glory, Judge Ives finds other and perhaps more significant titles of remembrance. Along with religious freedom, of course, went separation of Church and State. To the first meeting of free burgesses to draw up a legal charter, the three Jesuit missionaries who accompanied the colonists were invited as a matter of course; for in the matter of property holdings they were on a par with the others, and not a charge on the colony. The Jesuits refused to attend; and to this precedent the author ascribes the tradition that clergymen in Maryland are not elected to the legislature. In the other colonies, of course, especially in New England, government was almost completely under the thumb of the clergy.

A second precedent was the independence of the colony with regard to the Crown and Parliament. This was founded on the Charter itself, but definitely consecrated in the legal code drawn up by the Assembly of the colony, and ratified by the "memorable letter" of Lord Baltimore of August 21, 1638 to his brother, authorizing him to give assent in his name to all laws "as you may think fit and necessary which shall be consented unto and approved of by the freemen of that province or the major part of them or their deputies." 2 "This marks a transition to representative democracy," 3 remarks the author, and he is not slow to draw the contrast with the other colonies, and the significance of the fact as to later events. Thus early was the germ of the present British Commonwealth of Nations incubated.

Self-government, however, is not the whole of the case. Equality of civil rights was an even more significant innovation. "In no other colony," says our author, "was the voting franchise so freely given and so free from restriction." 4 Further, he remarks, "the contrast between Puritan Massachusetts and early Catholic Maryland is the contrast between a theocracy and a democracy." 5 And in the whole of Chapter VII of Book II, Judges Ives, while pointing out that the Proprietary colonies of Maryland, Pennsylvania, Maine, and New York were far ahead of the others in civil and religious liberty, states that the claim to priority in this field must be awarded to Maryland. He also blasts the myth of liberty under Roger Williams in Rhode Island.

2 P. 159.
3 Ibid.
4 P. 177.
5 Pp. 177-8.
On the score of religious liberty in Maryland, the author is at his best. The point here is that it was not so much that the 1649 Act of the Assembly granted religious freedom (though it did that also), but that the practice of tolerance went beyond the Charter and the Act. By this instrument, Jews were implicitly denied freedom of worship. But when Jacob Lumbrozo appealed for this right, he was left in free exercise of it.

It is a sad commentary on human frailty that this very tolerance brought about its own downfall. Lord Baltimore invited the Puritans of Massachusetts and Virginia to enter his colony. Under Cromwell, they rose up against their protectors and abolished tolerance for the Catholics. Baltimore’s rule was re-established again, it is true; but this was the beginning of the end. In 1691, King William overthrew the Proprietary and the Church of England was established in the colony. The whole system of English penal laws was introduced, and Catholics found themselves, sad to relate, thrust out of their own house, denied all rights of citizenship, and even refused the right of worshiping in their own churches. Our author quotes Bancroft: “In the land which Catholics had opened to Protestants, the Catholic inhabitant was the sole victim of Anglican intolerance.”

An interesting sideline of the whole history of tolerance is the large space given by the author to the position of the Jesuit Missionaries who accompanied the first colonists, and remained to the end the only Catholic clergy in the colony. During the penal times, of course, they were in hiding and had to resort to all kinds of disguises to exercise their ministry. The much-misinterpreted chapter in Maryland’s history of the controversy between the Jesuits and the second Lord Baltimore receives full and sympathetic treatment.

In Book III, which there is no space here to summarize, the author carries on the story of Maryland up to the framing of the Tenth Amendment. In it, he shows the great part which was played by Daniel Carroll in the setting-up of our system of divided sovereignty, and the debt which he and the Convention owed on this point to his Jesuit teachers, and to the great writers, Bellarmine and Suarez. It is an interesting and little-known chapter in our history. For this and for the whole book, the American public owes Judge Ives a debt of gratitude.

WILFRID PARSONS, S. J.*

* Professor of History, Graduate School, Georgetown University; sometime Editor of AMERICA.

* P. 259.

This book appears at a time when there is much public interest in the work of the United States Supreme Court, and may well be read by every thoughtful layman, for whom, rather than for the professional law student, it is primarily written. It is doubtful, however, if the reader will find herein a scientific and impartial treatment of the great problem as to whether or not the Supreme Court furthers or hinders social progress in the United States. The author approaches his problem from a definitely fixed viewpoint, i.e., that the Congress rather than the Court should have the final word as to national policy enacted into legislation. If Congress has this unrestrained power, the author does not fear that it will encroach upon the principles of federalism and personal liberty. The author prefers Professor Dewey's definition of liberty rather than former President Herbert Hoover's. The latter "defines liberty simply as the right of the individual to do as he pleases," while Professor Dewey "insists on including within his definition of liberty the concept of economic security." 1

In many of the recent New Deal Laws held void by the Court, the author using this major premise of liberty says, "it is here that the Court and not Congress becomes the enemy of liberty, for it is the Court and not Congress that has said many of these things may not be done." 2 Hence, approaching his problem with this a priori viewpoint, the writer comes to the conclusion that something must be done to make the Court more responsive to the public; for under the present system, it is said that the justices are not furthering the principles of democracy in that they are not subject to control by the people.

To demonstrate that the Supreme Court has stood in the way of social progress, the author takes up six recent decisions in the Court largely overthrowing New Deal laws, such as the Railway Pension case,3 the NRA,4 the AAA,5 the TVA,6 the Guffey Coal7 cases, and the New York Minimum Wage case.8 All of these decisions involved "efforts that our national government has been

† Assistant Professor of Government in the University of Oklahoma.
1 P. 127.
2 P. 129.
8 Morehead v. People ex rel Tipaldo; 298 U. S. 587 (1936).
making to lead the country through and out of the worst economic depression in its history.”

The author believes that the Court could have ruled either way on these laws, in view of the flexibility of constitutional controls involved, and reaches the conclusion that evidently matters of policy had actuated the majority where the opinion was not unanimous. Certainly, it is difficult to rationalize the holding of the Court in the NRA case and at the same time its holding in the TVA, although many constitutional lawyers would have said that prior precedents compelled the result in the NRA, while no precedents at all were to be found in the TVA decision. And it would seem that the author is not justified in charging hypocrisy to the Court in its decision in the Guffey case as contrasted with that in the New York Minimum Wage decision. For a long line of holdings in the Court had drawn clearly the distinction between coal mining and commerce, the former being subject only to state control while the latter might be under Federal control. And to say that, when the Court did not permit New York to maintain a minimum wage law (even though same is of intrastate concern), the Court was guilty of hypocrisy is far fetched. The confusion in the author’s mind relates to one of jurisdiction. The Guffey decision held as to jurisdiction that the Federal Government could not invade the intrastate field of coal mining a matter for the States. The Minimum Wage decision in New York held that, while granting this was within the jurisdiction of the states, still the law before the Court had not complied with other conditions under the Constitution. The great trouble, in my judgment, with framing minimum wage laws is in their draftsmanship, i. e. that usually the legislative duty is unilateral, upon the employed only, without commensurate duties imposed upon the employee to be worth from the standpoint of skill or experience, the minimum wage fixed by law. And the Constitution was drafted in part because of the belief that there was a “no man’s land” where the State or Federal Government could not enter. If this is to be changed, the Court cannot do so, it must be an act of the people through an amendment.

To reform the present system in which the Court is said to be a bar to social progress, the author has a number of remedies, such as an amendment to take away the power of the Court to declare acts of Congress or President void; an amendment to give Congress greater and more explicit power to control industry and agriculture; a Congressional Act to “pack” the Supreme Court with new justices; a Congressional Act depriving the Court

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9 P. 38.
on appeal from hearing certain cases; or to "play a waiting game" until a justice resigns or dies, when a new justice more favorable to social progress can be appointed. The author favors this last plan as the more practical and fraught with less political opposition.

There is really nothing novel or original in this work. All this has been said before by such writers as Boudin, in Government by Judiciary, and by Corwin, in The Twilight of the Supreme Court, not to mention many other writers in the field of constitutional law. The author himself pays tribute to the late Justice Holmes who said "I do not think that the United States would come to an end if we lost our power to declare an act of Congress void." And it is difficult to find these arguments convincing to one who has seen the Supreme Court invalidate many harsh and arbitrary laws of Congress, which were violative of constitutional principles based upon fair dealing and fair play; it has sustained laws favorable to social progress in upholding workmen's compensation, employers' liability, anti-injunction laws, all sorts of wage payment laws, etc. To make Congress supreme where the majority prevail, and where during the past few sessions the Executive power dominated, opens the door to enactment of all kinds of measures that are based upon expediency and vote trading rather than upon fundamental principles of fair dealing such as the Constitution, based upon experience, has found to be wise. As a matter of fact, invalidation by the Supreme Court of the measures discussed gave renewed confidence to business to go ahead during the period of industrial recovery we are now enjoying, while validation of the TVA by the Court has not yet released the public utility industry from uncertainties and fears, delaying much needed expansion in this field.

The author is clearly correct, on the other hand, that the Constitution deals in broad formula, giving the Court much latitude of construction, wherein matters of economic policy undoubtedly play a factor, sometimes the main factor, in reviewing legislation. But here again, with a personnel free from politics, the Justices on the Supreme Court can reach a sounder judgment than can politicians with an eye to interests and votes. Quite often, too, legislation is poorly drafted, or too ambitious in its scope, and blame is placed upon the Court when it should be placed upon the Congress. Moreover, after all is said and done, there are certain basic economic laws which govern human relationships despite all enactments to the contrary, which may be

10 P. 127. Italics by the author.
designated as mere froth. And while we have undoubtedly reached a place in national development, due to electricity, radio, and the airplane where larger centralized control is necessary in political matters, still it is far better, in the reviewer's judgment, at least, to place suggested changes squarely before the people for their approval or disapproval, rather than to take some short-cut method of depriving the Supreme Court of powers long held to be a basic part of our federal structure of government. However these developments will be treated in future, the layman can with profit read Democracy and the Supreme Court, but he must bear in mind that he is reading a polemic rather than an impartial account.

E. F. ALBERT SWORTH.*


In the Preface to his The Constitution and the Men Who Made It, Mr. Hastings Lyon gives the alert reader three fair warnings. He says that he is a lawyer. He dismisses Charles Beard’s great work, An Economic Interpretation of the Constitution of the United States, as “provocative of thought.” ¹ And he confesses—although the unfortunate reviewer is unable to take the hint—that “stress of conflict manifested only in the shaping of phrases leaves the observer bored.” ²

Mr. Lyon need not have told me that he is a lawyer. Any one of his two hundred and eighty-six dreary pages, picked at random, would shout the fact for him. Only a lawyer, or perhaps one of the older school of theologians, could swallow with such evident relish in a quagmire of empty concepts. Only a lawyer, certainly, could take that meeting of men alive with their human impulses, desires, and weaknesses—the Constitutional Convention of 1787—and turn it into a grammarians’ wake. Only a lawyer could, for instance, consider it “appropriate” to discuss the fact that “the word ‘ratification’ as it appears in the Constitution . . . is not a juristically correct usage.” ³

Nor need Mr. Lyon have been so explicit about damning Charles Beard’s work with feigned praise. Mr. Lyon’s own political

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† Associate Professor of Finance, School of Business, Columbia University.
¹ P. viii.
² P. vi.
³ P. 140.
philosophy bobs out often enough, even through the welter of his words. His almost classic understatement that the men who took part in Shays' rebellion were "sorely disturbed"; his bristling and irrelevant defense of "sound" money; his dogmatic (or else meaningless) statement that "every society, to progress in material well-being, must make some provision for the accumulation of capital," his anxious but clumsy justification of every property-protecting clause in the Constitution, his contrasting of democratic Jefferson's "mental loose-jointedness" with aristocratic Gouverneur Morris' "well-knit mind"—these and other outbursts are right in the tradition that flows from Alexander Hamilton down through Herbert Hoover. "Did the delegates in the Convention endeavor to further the interests of certain social classes at the expense of the welfare of other classes?" asks Mr. Lyon at the beginning of one chapter. And after twenty pages of avoiding any direct answer, Mr. Lyon concludes his chapter in this self-revealing fashion: "As Gerry said, 'if property is one object of government, provisions for securing it cannot be improper.'"

As for the third warning in Mr. Lyon's Preface, it is inevitable that the "observer" will be "bored", and then some, by an author who can find no more going on in the Constitutional Convention than "the shaping of phrases." Nor do the brief biographies of some of the delegates, stuck here and there throughout the pages, bring an account of "the shaping of phrases" to life. Mr. Lyon describes his book almost too perfectly when he admits, again in his Preface, that "the tale tends to become a desert of other words in which the plodding reader cannot perceive that he makes progress".

Mr. Lyon not only writes about words; he uses words badly. His is a bulky, legalistic, pseudo-classical style, full of Latin phrases and literary and biblical allusions. Occasionally, some monstrosity, even among monstrosities, such as "pejorative" or "strabismus", pops up and clouts the unsuspecting reader in the eye. I am interested in the Constitution, and I have read a

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4 P. 38.
5 Pp. 25-29.
6 P. 147.
7 P. 277.
8 P. 184.
9 P. 203.
10 P. vi.
11 Ibid.
good many books about it, but I have never read any book on that subject—or, for that matter, on any other subject—in which it took such a determined effort of will to force my mind to go on to each next sentence.

If Mr. Lyon had anything to contribute, I suppose it would not matter so much that his book makes painful reading. He has nothing to contribute. To list the instances of his superficiality and lack of understanding of the real struggles of the Constitutional Convention would require a book almost as long as his. Anyone who thinks, to take just one glaring example, that the delegates who sometimes talked "states' rights" for tactical reasons were genuine anti-federalists had better go back to his sources and start all over.

Moreover, Mr. Lyon, either unable or unwilling to see the real issues, invents and then complicates his own issues. He devotes considerable space to such esoteric exercises as the application of the legal theories of agency and "social contract" to the founding fathers' conceptions of sovereignty. He has a chapter on "Political Theory in the Convention", and when I had driven myself most of the way through it, I came on a phrase which I did not read as Mr. Lyon wrote it. The phrase was "But what of it?"

If this review sounds a bit brutal, remember that I owe Mr. Lyon something. I had to read his book. To anyone else, in all seriousness, I recommend as not only more useful but quicker and pleasanter reading, the whole of Madison's notes on the Convention; the quotations from Madison that Mr. Lyon scatters through his pages come like light fiction interludes by contrast. And for Mr. Lyon's own enlightenment and entertainment (and both are pure generosity on my part) I suggest Irving Brant's Storm Over the Constitution, and also Fowler's Modern English Usage with special reference to a little article on Love of the Long Word.

Fred Rodell.*

13 C. vii.

*Associate Professor of Law, Yale University School of Law. Author of Fifty Five Men (1936), reviewed in (1937) 25 Georgetown Law Journal 788. Professor Rodell is also the author of a provocative article Goodbye to Law Reviews (1936) 23 Va. L. Rev. 38.


At first glance, these three books would seem to have little in common. Certainly, their backgrounds are entirely different. Mr. Desvernine is a New York lawyer in active practice, the chairman of the National Lawyers Committee and member of the executive committee of the American Liberty League. He is still a Democrat but, like David B. Hill after the third nomination of Grover Cleveland for the presidency, "very still".

The author of The Promise of American Politics is a professor of philosophy at the University of Chicago and State Senator from the fifth district of Illinois.

The author of the third volume, Progress and Power, is also a college professor but in the Department of History at Cornell University.

These volumes accordingly spring from variant viewpoints of law, philosophy, and history. However, they are all studies in current political philosophy, reflecting the experience and research of their respective authors.

The dedications are significant. Mr. Desvernine dedicates his book to his son; Professor Smith, "to fellow politicians, at once the hope and the despair of the American people"; Professor Becker to a friend "who possesses and has needed forbearance and understanding".

Democratic Despotism is a savage attack upon the New Deal in all its aspects. Mr. Desvernine writes:

"My personal comments and interpolations represent the opinions of one schooled in, and devoted to, the political philosophy and the ideals of freedom established by the authors of Americanism. It is my hope that the contradictions and incompatibilities between the two schools of political thought—Americanism and the New Despotisms; Constitutional Democracy and the Totalitarian State—may become as real and vital to my readers as they are to me".1

† Member of the Bar of New York, Counsel to the American Liberty League.
‡ Professor of Philosophy in the University of Chicago.
§ John Stambaugh Professor of History in Cornell University.
1 P. x.
The essential principles of the American system are accurately stated. The necessary clash between those principles and the program of the New Deal is well pointed out. The vindication of the Constitution by the Supreme Court is praised. However, this book was sent to the printer on April 7, 1936. Since that time, noses have been counted in America and it is claimed that the Supreme Court must follow the election returns. Mr. Desvernine closes his book with an adaptation of a historic utterance: "Delano, quo vadis?" On Black Friday, February 5, 1937, Mr. Desvernine received an answer. From his book, we know that it was highly unsatisfactory to him.

In *The Promise of American Politics*, Professor Smith, upon the bases of his philosophical studies and his practical political experiences, has written an exposition of certain modern creeds. Separate chapters are devoted to Individualism, Liberalism, Fascism, Communism, Parliamentarianism, and Americanism. In footnotes, he has set forth extracts from speeches made by him in the Illinois Senate. The first one is introduced as "a means of resting from the perusal of the text proper". Some of these speeches must have caused some consternation in the Illinois Senate, especially his discourse on "Agoraphobia". He ends his book upon a note of optimism:

"That politics is a moral enterprise; that character to carry it on is no gift of the gods, but a by-product of the process of getting and using skill; and that in the very functioning of skill itself, when accompanied by some magnanimity of imagination, is to be found the highest human individuality and the deepest happiness of man."

*Progress and Power* consists of three lectures delivered at Stanford University on the Raymond Fred West Memorial Foundation in April, 1935. They are: "Tools and the Man"; "The Sword and the Pen"; "Instruments of Precision". Only 102 small pages are required, but what a breadth of knowledge and what a depth of understanding are revealed! Professor Becker takes his stand upon the Olympian heights from which he surveys human history from the "Java Man to Mussolini—or Roosevelt". This period he estimates to be 506,000 years of which the first 450,000 only bring man to the point where he has learned to use fire and simple tools. The next 50,000 years of primitive community living bring us to the invention of writing. The 5000

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2 P. 18.
3 P. 266-270.
4 P. 284.
5 P. 17.
years following the invention of writing bring us to the fourth period which has now only run a scant 1000 years. He dates the fourth period from the discovery of magnetic force. He points out that the idea of progress is a modern one, scarcely older than the 17th century; that it sustained the western world for two centuries; that since 1918, it has perceptibly faded. He eloquently states his recognition of values, not as permanent but frankly temporary and conflicting:

"I myself recognize certain values which I endeavor to make prevail—with limited success it must be said in view of the victorious onset, at the present moment, of alien ideas throughout the world. The values I most cherish do not thrive well in the market place or on the 'social front'. They are roughly symbolized (as ideals, be it understood, not as description of fact) by the words Liberty, Equality, Fraternity, Humanity, Toleration, Reason. I have a profound aversion from all that is implied (again in the light of what is desirable, not of what may be necessary) by the words Authority, Compulsion, Obedience, Regimentation, Uniformity, Standardization; a profound disbelief in the virtue of solutions effected by non-rational means, by physical force or the pressure of emotion in mass formation."  

He cites the statements of scientists that there will be an end, some undetermined billions of years hence, when the whole temple of man's achievements must inevitably be buried beneath the debris of a universe in ruins. But, since that catastrophe is a few billion years off, he holds that there is time enough for man to find Utopia and live in it for a billion years or so, in order to prepare him spiritually for ultimate extinction and quiescence.

In the third lecture, the success of man's effort to control the forces of nature is vividly described against the background of the failure of man in his efforts to regenerate society. Nor must one overlook the fourth and final section of Lecture Three. Quotations cannot do justice to it. Perhaps they will whet the appetite of some readers of this review, who will be led to read and re-read this great little book.

"An eminent mathematician has announced that God is probably a mathematician. Let us assume that he was guilty of a slight error—that he meant to say that a mathematician is probably God."  

From this viewpoint, Professor Becker attempts a survey not simply of man and the world, but man and the universe. He finds man mere "animated dust"  in the great cosmos of the universe and, like the cosmos itself, doomed to wane. But after this terri-

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6 Pp. 11-12.
7 P. 99.
8 Pp. 99-100.
ble shock to the proud human, the author strikes a final note of assurance:

"The significance of man is that he is part of the universe that asks the question, What is the significance of man? He alone can stand apart imaginatively and, regarding himself and the universe in their eternal aspects, pronounce a judgment: The significance of man is that he is insignificant and is aware of it".9

GLENN W. WOODIN.*


Briefly stated, Professor Corwin's thesis is this: The Supreme Court has placed unjustifiable limitations on the Congressional power over interstate commerce by gratuitously construing this power as narrower in scope than that over foreign commerce, by holding that it cannot be employed to promote the general welfare, that it is circumscribed by the reserved powers of the states, and that the validity of its use may be determined by judicial inquiry into the legislative motive. To Professor Corwin, the position which the Court has taken is vague, equivocal, and contradictory and results in nullifying the supremacy which the Constitution accords to federal authority.

Professor Corwin's book might better have been entitled The Commerce Power versus Property Rights. As he indicates, the restrictions on the interstate commerce power are not the product of an abstract theory of state sovereignty, but were originated to protect the plantation economy of the South, and subsequently came to full flower as the implementing devices of laissez-faire.

The author does well to point to the economic bases of legal doctrine. It is meaningless to think of our Constitutional history as a great struggle between two antagonistic concepts—nationalism against state rights. Men adopt political theories not on purely philosophical grounds, but because they find in these theories a justification for desired action calculated to further their interests. And they will readily abandon their theories when their interests demand a course of conduct which the former can no longer support. Under such circumstances to charge them with inconsistency is to be blind to the main-springs of politics and law.

9 P. 101.
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† McCormick Professor of Jurisprudence, Princeton University.
It is only the superficial observer who sees contradiction when he finds Jefferson, that vigorous opponent of centralization, suddenly veering and extending federal power to hitherto unheard of lengths through the acquisition of the Louisiana territory. For the more discerning student, it is consistent statesmanship of a high order. He knows that Jefferson's advocacy of state rights was grounded in his hostility to the commercial and financial forces of the Northeast, and he realizes that by furnishing free access to the great continental waterways, Jefferson was enabled to bring West and South into an economic and political alliance, which for more than half a century controlled American politics in the agrarian interests. So, too, the complete reversal by both Calhoun and Webster of their original positions on the constitutionality of a protective tariff is to be explained by reference to the economic development of the country; and when so explained, each remains a constant spokesman for the section which he championed in the legislative halls.

With this in mind, it is not possible to accept Professor Corwin's charge of inconsistency which he levels against the Supreme Court in its interpretations of the commerce clause. True it is, as he shows conclusively, that the Court has not followed a straight course and that in its reasoning there are contradictions, ambiguities, and attempted distinctions which escape understanding. But that is only on the surface. When we look to the fundamental issues behind the words and to the effect of the immediate decision upon those issues, the inconsistencies and confusion disappear and there emerges a clear and well-defined pattern.

The Supreme Court has steadfastly guarded the interests of the dominant property groups against hostile action by government. In affording this protection, the Court has been compelled from time to time to select different weapons from the armory of constitutional doctrine but only because the enemy itself shifted the ground and utilized new instruments of attack. The tenets of broad federal power, first enunciated in *Gibbons v. Ogden* ¹ were used to insure to commerce and industry the fullest enjoyment of our national markets free from local interference. Later the same principles were utilized to defeat attempts at state regulation by forcing the states to give way to the primacy of federal authority. When, however, the federal government itself ceased to foster and sought instead to impose restraints upon private enterprise the powers hitherto accorded to it were

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¹ 9 Wheat. (1824).
cut down, as Professor Corwin points out, by an inverted construction which made state power a limitation on federal jurisdiction.

Professor Corwin tellingly indicts the absurdity of giving the word "regulate" a different and wider meaning with respect to foreign commerce than interstate commerce, though the Court was defining the same word used but once in the same sentence. The explanation, however, is obvious when we remember that, up to the present, Congress has regulated foreign trade in aid of business and not in opposition to its interests. For the same reason, the Court has thus far held that the reserved powers of the States do not restrict the federal authority in the field of foreign affairs, and it has permitted the federal government through an exercise of the treaty making power to deal with subjects which are solely within the province of the states. However, let those who seek regulation and restraint for social objectives turn to the use of these powers and then we will see whether the Court will accord them the same sweep as at present.

For these reasons, Professor Corwin's plea that the Supreme Court return to the doctrines of Gibbons v. Ogden \(^2\) is futile. It presupposes that Marshall would have sanctioned the use of the interstate commerce power for the purpose of limiting the freedom of individual enterprise. One needs only to read Marshall's views on the nature of property and contract, set out in his dissent in Ogden v. Saunders \(^3\), to know where he would have stood on the major issues of today. Just as his antagonism to local banks led him in Providence Bank v. Billings \(^4\) to cut down the principles which he had expounded in Dartmouth College v. Woodward \(^5\), so, it is safe to say, he would have followed the present majority in preventing the use of the commerce power as a means for bringing private property under restraint in the interest of social needs.

The Supreme Court has not only maintained an inner consistency but it has remained true to its function in our governmental system. It is an open secret that the framers of our Constitution were much concerned with the dangers of popular attack upon the rights of property. One needs only to read Number 10 of the Federalist to see how well those early statesmen understood the economic origins of political division and conflict and to realize that they were devising a form of government

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\(^3\) 12 Wheat. 213 (1827).

\(^4\) 4 Peters 514 (1830).

\(^5\) 4 Wheat. 518 (1819).
deliberately designed, in the words of Madison, "to break and control the violence" and to cure "the mischiefs of faction"—the word "faction" meaning to him "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens." It is likewise clear that they looked to the judiciary, as the last line of defense, should hostile forces succeed in breaking through all other barriers. Those who believe that the general welfare requires increasing restraint upon private property must recognize that their quarrel is not with the personnel of the Bench, not with this or that judge, but with the Court as an institution.

In fulfilling its essential purpose, the most effective instrument at the command of the Court is the power of judicial review which gives it a final veto over all legislative and administrative action, both federal and state, and thus makes it, for all practical purposes, the supreme political sovereign. Professor Corwin is keenly aware of the faults of judicial censorships. He shows how impossible is the task of judging the validity of legislation by the motive behind the enactment, how unreal is the claimed search for the legislative intent and how the whole process is actually only one other means used by the Court to annul measures, the policy of which it disapproves. Judicial review, as he quite justly charges, has resulted in overriding the will of Congress even where its power to act is not challenged, has created almost insuperable obstacles in the way of effective action by a fanciful doctrine of delegation of legislative power, and has hampered and confused administrative agencies in their efforts to enforce unquestionably valid laws so that in many fields social control has practically been nullified.

But if Professor Corwin's clinical findings are accurate and his diagnosis sound, the remedy which he prescribes falls short. He correctly rejects an amendment which would merely undertake to confer new powers upon Congress. As he points out, it would be difficult to find adequate language and even then it would be subjected to the same process of judicial interpretation which might render it largely nugatory. We recall what the Court has done to the Eleventh Amendment and the limitations which it quite unnecessarily and unjustifiably imposed on the Sixteenth. Seeing no relief in an amendment which would only attempt an extension of legislative power, Prof. Corwin feels that we can do nothing better than to "trust the Court, as we have so largely in the past, to correct its own errors."  

P. 265.
Yet Professor Corwin's own analysis of what the Court has done proves that it is not the result of "errors". Surely the Court has had sufficient opportunities to avoid mistakes. Not only in the briefs of counsel and in scholarly critiques, but in the dissenting opinions of its own members, the departures from principle, the inconsistency and illogic of its position have been pointed out time and again in clear and vigorous language. The Court has acted not from ignorance, but, as has already been said, in accordance with the basic tenets of its existence, faithfully fulfilling its mission. Professor Corwin's conclusion resolves itself into nothing more than a plea to the Court that it shall assume the role of an enlightened monarch, ruling with greater moderation and tolerance and yielding more gracefully to the desires of its subjects.

Having pointed out the deficiencies of judicial review, it is disappointing that Professor Corwin did not address himself squarely to this question. For here is the central issue in any debate over the Supreme Court and the Constitution. It is an issue which goes beyond the problem raised in the theory and practice of political democracy, when the real direction of public affairs is shifted from representative legislative assemblies to the courts. It transcends the immediate struggle between conservative and liberal forces over the adoption of a broad program of labor and welfare legislation. It is an issue which is more profound and basic, involving as it does our very ability to fashion a government capable of meeting the needs of a modern society.

Judicial supremacy was accepted because it insured that maximum freedom which best suited us in early days. It is the ultimate expression of laissez-faire. But laissez-faire will no longer serve. Individualism has become dangerous even to itself. The complexities and interdependence of present day industrial life demand social control on a major scale not only on behalf of those who have no property but for the sake of property itself which, in a modern economy, requires ordering and restraint to assure its own security and prosperity. No group of our society can much longer afford judicial review in its present form. It is now apparent that the continued welfare of each demands that public authority grow increasingly positive in action, widening the scope of its concerns and bettering the efficiency and sureness of its administration. Judicial review, as now practiced, has become an anachronism standing rigidly in the way.

Herman A. Gray.*

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Professor Laski needs no introduction to scholars in this country. Since 1917 when The Problem of Sovereignty appeared, there has issued from his gifted pen a series of brilliant political studies which have gained for him a preeminent position in the field of political science on both sides of the Atlantic. His writings uniformly have been marked not only by their excellent style but also by the originality and profound insight which they have brought to bear upon outstanding problems of modern politics.

Many have observed with great interest the metamorphosis that has taken place in the political ideals of this distinguished British scholar. Classed at the outset as a liberal in thought, he did not follow the usual course of growing with age more conservative, but instead became increasingly liberal in his point of view until the stage was reached where his liberalism was shading off in a radical hue. Quite recently the change seems to have been completed, and he is now emerging as a full-fledged exponent of communistic thought.

Professor Laski's study is at once a criticism and a vindication. He has traced the course of liberalism, as a political doctrine, through three centuries of experience, and in so doing has attempted to demonstrate its present inadequacy and ultimate disappearance as a guiding concept for the modern state. Liberalism is conceived to be the philosophy of a business age, designed to hold the will of the state according to the best interests of the holders of property in a capitalistic society. It arose when feudalism was collapsing under the impact of new social and economic forces and when the prevailing political concepts were becoming increasingly inimical to and restrictive of the needs of the new economic society which was then emerging. Successful at the outset in the struggle against the pretensions of the church, it has since embodied whatever ideas of the state that would provide under existing conditions the most adequate safeguards to the property right. Thus liberalism has sponsored successively the supremacy of the state over the church, the divine right of kings, mercantilism, the social contract theory, and the doctrine of laissez-faire. As changed environment has necessitated one set of principles has been discarded in favor of another set of principles that appear more congenial to the spirit and purpose of existing economic institutions. In this way liberalism pro-

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gressed from the early concepts of unlimited state power to the idea of the fettered state which is implied in the tenets of the social contract philosophers, and which is given fullest expression in the freedom of contract ideology of the nineteenth century.

Professor Laski envisages liberalism as the philosophic justification of a capitalistic society. The destinies of the two are therefore inseparably joined. Because he foresees the ultimate destruction of capitalism, liberalism itself cannot survive. "It never understood, or was never able fully to admit, that freedom of contract (in the modern liberal state) is never genuinely free until the parties thereto have equal bargaining power. . . . The individual whom liberalism has sought to protect is always, so to say, free to purchase his freedom in the society it made; but the number of those with the means of purchase at their disposal has always been a minority of mankind." 1 So, like all social philosophies, liberalism contained in its birth the seeds of its own destruction, an event deemed to be hastened by modern conditions that demand a new social order in which profit-making is no longer the sole energizing principle.

One may well take issue with both the analysis and the conclusion which the author has so ably presented. What he has given us is an economic interpretation of history; but history cannot be satisfactorily interpreted from a single point of view. One cannot travel swiftly through three centuries of political thought on a single narrow road and see all that there is to see. He must explore other paths along the way, and climb to many points of vantage if he is to perceive all the diverse configurations of the human geography surrounding him. This is of course a monumental task, but on nothing less can the interpretation of human events effectively proceed. What Professor Laski sees about him today is visualized only in terms of what he has observed in the past; and his glance into the future is similarly circumscribed.

This book has proceeded by a priori reasoning from a general assumption dictated by the author's own predilections to a foregone conclusion in which the death-knell of capitalistic philosophy is sounded. It is not surprising, after all, that one who advocates the destruction of capitalism itself would in this manner condemn the political doctrines upon which that system is based.

Paul T. Stafford.*

1 P. 9.

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THEORIES OF INTERNATIONAL RELATIONS—by Frank M. Russell.

The author correctly claims in the Preface to this book, that "up to the present, there has been no survey of the development of man's ideas concerning the relationship of independent political communities".\(^1\) The emphasis is on the word ideas. This is not a record of events on the international scene in successive periods of history. What Professor Russell started out to do, and what he did in fact accomplish in a highly creditable manner, is something very different and, in this field, wholly novel. In this treatise Professor Russell presents a bird's eye view of the attitudes and philosophies toward international relations which prevailed on, or influenced, or characterized successive stages of civilization. In a pleasant and readable style, he acquaints us with the views held by primitive peoples at the dawn of history; by statesmen and philosophers of the ancient societies of China, India, Greece and Rome; with the theories advocated in medieval Europe, during the Renaissance, the Reformation and following the rise of the national state, down to the present time. The bulk of the book is naturally given over to the modern period; the survey of ideas up to the close of the eighteenth century occupies only about 200 pages, while the remaining 450 pages are devoted to the analysis of the phenomena of the nineteenth and twentieth centuries. In this latter part, Professor Russell sets forth the precepts underlying nationalism, imperialism, pacifism, the balance of power, the League of Nations, the recent moves for the outlawry of war, collective security and disarmament, communism and the totalitarian state. The somewhat heterogeneous content of the Appendix is illustrative of the author's unconventional approach to international relations. It may be assumed that the selection of documents there printed (The Covenant of the League, the statute of the Permanent Court of International Justice, the charter of the International Labour Office, the abortive Geneva Protocol of 1924, The General Act of 1928, the Kellogg-Briand Pact, the Briand Memorandum on the Organization of a European Federal Union, extracts from the Communist Manifesto, and from the 1934 report of the Central Committee of the Communist Party of the Soviet Union) is indicative of the author's conception of the basic currents underlying international relations in the post-war era. The usefulness of the treatise as a reference book is greatly increased by the selected bibliographies

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\(^1\) P. v.
at the end of each chapter. These also show the immense labor which Professor Russell put into the preparation of his book.

I believe that no student of international affairs—whether a lawyer, economist or historian—should neglect reading this work carefully. He will find not only illumination but also pleasure in doing so. The panorama of the views and philosophies of great thinkers of all times and tribes as to the aims and vocations of independent communities, the methods whereby such aims should be accomplished and the conduct and behaviour of nations in their relations with one another is of course fascinating. It must have been a difficult and arduous task to extract the salient points from the writings of Confucius, Aristotle, Erasmus, St. Thomas Aquinas, Vittoria, Sully, Bodin, Crucé, Machiaveli, Hobson, Grotius, Montesquieu, Rousseau, Kant, Bentham, Hegel, Cobden, Fichte, Bebel and Nicholas Murray Butler—to mention only a few of the several scores of thinkers examined by Professor Russell. It must have been even more difficult to reduce these salient points to intelligible proportions and to integrate them into a telling story. Obviously, the struggle between the "realists" and the "evangelists", or between those who advocate that might is right, and those who would conduct international relations by orderly processes of law and equity, is not characteristic of the present generation alone; it has been so ever since independent politically organized societies have had to deal with each other. Neither does it seem that we of the United States can claim a monopoly on the effort to make the earth a better and happier place to live in,—for, as it appears from this book, people have sought from time immemorial to reform the world.

The various theories of international relations are presented and expounded by Professor Russell in a wholly objective and detached manner—the test of honest scholarship. He shows no preference for any view or philosophy; when the subject-matter is controversial, he presents the arguments on both sides without emphasis or innuendo. It is difficult to discern whether or not the author's sympathies are with the pacifists; it certainly is impossible to find any trace of his approval or disapproval of the political, social or economic experiments indulged in by various countries. In brief, the book commends itself as an exceptionally well-written, well-balanced and useful contribution to the study of international relations. The method adopted carries with it, of course, an obvious limitation in scope, namely, that the book is a compilation of theories—albeit an interpretative compilation—and does not represent an original contribution in the form of a
theory of international relations evolved by Professor Russell. The author's citations of authorities on some points of international law are questionable; but as against the excellence of his accomplishment as a whole, whatever faults may be found in minor details, they ought to be disregarded under the de minimis rule.

FRANCIS DEAK.*


The Story of Congress is not, as might be thought, an account of the ways, traditions and development of Congress as a governmental organ, but a history of American politics as reflected in the events on the floors of the Senate and the House. The text is sprightly and tinted, skilful in its progression but so shallow and journalese in method that one puts it down in desperation. Mr. Bates writes quite brilliantly. His vocabulary is varied and comes easily to hand. His thought is orderly, his effects well and confidently made. It seems unfortunate, therefore, to see so much ability focus on a fresh and almost new adventure in historical criticism, and yet yield so little.

After a sketchy prologue covering the political events leading up to the Constitution of 1787, the author divides his play into eight scenes or eras, with an epilogue at the close on The New Deal. The names of these scenes reveal his mind and method: The Federalist Foundation; Jeffersonian Democracy; Jacksonian Democracy; Compromise with Slavocracy; Overthrow of Slavocracy; Industrialism; Capitalism; Era of Reforms; Finance Capitalism. In every one of these scenes a subdivision is made for each president, and under each executive another subdivision for every successive Congress by number. At the end of a scene or era comes a summary of two or three or four pages. Within each interior compartment devoted to a numbered Congress, the book gives us a running account of the chief issues mooted or waged in that two year period. The author dwells a little also on the dramatic moments and on the persons of consequence. There are pungent quotations and many brief word-sketches of men like the erratic Randolph, the boy-orator Beveridge, Blaine or Thaddeus Stevens. Except for the fact that Mr. Bates is a little pos-

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sessed of the mood of making heroes of all men who happen to have been spokesmen for philosophies popular since the Great War, and of making fools or villains of all the others, his drawings of men are unusually keen for so terse a compass as he allows himself.

The debates, votes and manipulations of Congress itself, however, are not salty food, and even as skilful a chef as Mr. Bates has difficulty seasoning up course after course in his chronological menu. The truth is perhaps that his survey covers so many issues and personalities that all the flavor drains away in the condensation of them. Webster's debate with Hayne (for example) seems to have hinged on a trivial point in the long stretch of our history, if viewed with all the other great hours in a single perspective. It becomes dramatic only when the mind can dwell upon the problem of the West in 1830 long enough to comprehend its roots in the past, its consequences in future, and its impingement on the conflicting regional motives of the day.

The book is written, as the author himself declares, almost wholly from secondary sources, chiefly the standard histories. It is written, however, from a bias that seems to the reviewer so marked and probably so ephemeral in our American philosophy that the pages may seem quaint to readers of the next decade. Mr. Bates is an unquestioning disciple of what may be called the Beard school of history. Its apostles occupy most of the college chairs today and have turned the trenchant and useful contributions to scholarship made by their Mahomet and his companions into a crusading political religion.

The credo of this school is that all history can be explained on economic motives; that these operate through pressure groups who successively raid the fortress of the common man; and, usually, that the protection afforded by our American constitutional checks and balances was designed to be, and is, the real impediment to an ideal economic democracy which is the end and only goal of man. The school made some real contributions to our understanding in its day. It has afforded a great philosophical program for the revolutionary impulses in this country during the last dozen years. Its ideas in the form we know them have not been significant in European political thought. The school relies on too simple an explanation of history. The motives of men, one feels, are more complex and idealistic than is dreamed by these Horatios.

Mr. Bates' book is not merely seasoned but peppered violently with the slogans, asides and interpretations of the school in which
he has enlisted. He has spent his talent in making a book which is partly entertainment, partly a political document. It is not as good as Bowers' *Jefferson and Hamilton* because that basket carried some fresh fruit. It is a better book than Bowers' *Jefferson in Power*. *The Story of Congress* belongs in the same general category as the last named volume, but is more gracefully written.

JAMES GRAFTON ROGERS.*


This is an interesting book, revealing careful study, the results of which are given in a lucid presentation. As the title may indicate, the author does not concern himself much with an exposition of well-recognized rules and principles of international law relating to diplomatic immunity but rather with the uncertainties of the law. With the proper approach of the lawyer, he therefore undertakes to analyze the basic reasons for immunity. In the light of fundamental purposes of law, differences of views may be reconciled, and intelligent effort may be directed to the remedy of faults of uncertainty.

A chapter relating to the historical basis of immunity is interesting and useful. However, it may be observed that often the origin of a rule of law may be of little or no importance in gauging its merits under existing conditions.

Some years ago a youthful foreign diplomat was hailed before a magistrate in New England on a charge of driving at an excessive rate of speed. Naturally the diplomat pleaded immunity, and the magistrate promptly met the plea with the pronouncement: International law does not go in this court. He courteously apologized the following day for his ignorance of the law. The application of the law in this instance was a simple task. The author has cited many cases involving vexatious problems, and numerous others, some humorous, some serious, which have been less conspicuously recorded could, of course, be mentioned.

It is interesting to note that very early statutes of the United States, which were intended to give our Government a domestic machinery, so to speak, to give effect to the law of nations, are probably declaratory of established, broad principles of the law. The premises and the person of a diplomatic officer are inviolable. Restraint of person and property is forbidden. Legal process

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must not be served upon him either in civil or criminal matters. The rules of which these legislative provisions were designed to give effect seem to be simple. However, as the author has indicated by numerous illustrations, practical application of the law leads into many ramifications.

The author discusses various theories on the basis of which it has been asserted from time to time that the law is grounded, and he gives his views why some of them should be rejected as unsound and misleading. Among them he appropriately lists the "fiction of 'exterritoriality'". He properly also finds fault with some statements of the theory of "representative character" of the diplomat in relation to his sovereign or the government by which he is accredited. However, it is not clear that this theory may be rejected as completely as that of the fiction of exterritoriality. In connection with the immunity of a government's representative from legal process, it may not be inappropriate to take account by way of analogy of principles asserted from time to time by domestic courts in dealing with cases involving the status of ships owned or operated by a government or of other government-owned property. It has been said that such cases involve questions of jurisdiction. Perhaps the view might equally well be taken that they are concerned with rules of substantive domestic law and of international law pertaining to the immunities of a government or of government-owned property. It may be unfortunate that courts have felt constrained to accord some very extensive immunities. However, in dealing with problems of this kind, and more particularly with personal immunities of representatives, account has been taken of principles of comity which have been given effect in furtherance of friendly international relationships. Assuredly, it is unnecessary to say that the person of a diplomatic representative is "sacred" or to attach to his person some transcendental importance. And one need not approve the theory which the author ascribes to Blackstone that "the reason why ambassadors are not governed by municipal constitutions, is because they represent the persons of their respective masters who owe no subjection to any laws but those of their own country".

Statements such as that a diplomat "is not subject" to the laws of the country in which he is stationed may easily be misleading. The diplomat receives protection under those laws, sometimes a very special protection, and he is subject to them in the

1 See pp. 93-104.
2 See C. 5.
3 P. 108.
sense that they should be obeyed, even though they cannot be enforced against him by legal process. Certainly a measure of sanction of the law has been applied when occasionally transgressions of diplomats have bluntly been called to the attention of their governments. These of course are exceptional cases.

The author adopts a logical and safe approach when he advances a fundamental theory, that it is necessary in a given case to consider "whether the particular act in question violates the security which is necessary for the performance of the diplomat’s official function". If his language expressing this view is taken literally, it might be said, from a merely practical standpoint, that diplomats could generally be accorded a much less degree of immunity than they enjoy and still have abundant freedom of action “necessary” for the performance of their functions. Without indulging in attempts at excessive refinements of expression, perhaps it might be said that the underlying principle of immunity is that privileges are accorded to a representative with the purpose that there shall be no improper interference with his functions and also with a view to the promotion of international comity. In the light of these general principles, progress might be made in efforts to give certainty to the law.

Fred K. Nielsen.*


This is the fourth volume of Professor Sharfman’s study of the Interstate Commerce Commission. The first two deal with the legislative basis of the Commission’s authority and the scope of its jurisdiction over railroads and allied utilities and over intrastate commerce. The third and fourth volumes, taken together, present a study of the Commission as a functioning administrative body. The first of these last two presents a general outline of its varied tasks and an intensive study of the valuation project and control of organization and finance. The present volume is devoted entirely to the manner in which the Commission has exercised its power over the all important matter of rates. Since

* P. 175.

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† Chairman, the Department of Economics, University of Michigan; member, Advisory Committee on Railroad Employment to Federal Coördinator of Transportation.
this has been, as Professor Sharfman puts it, "from the outset the Commission's central task and most prolific activity" 1 and one to which most of its other powers are largely ancillary, it is evident that this volume is perhaps the most important one of the series. Professor Sharfman recognizes it as such for in the processes of rate control he finds "the most revealing and significant expression of the Commission's administrative labors".2

In considering this book it is important to keep in mind the author's statement in the Introduction that throughout the study, "The Commission itself is the primary object of investigation".3 It is this point of view that gives the work its outstanding importance. If one would know the work of the Commission, it is not enough to look at the mandates of Congress for they merely lay down general standards that leave open "an almost uncharted discretion in the disposal of specific proceedings";4 nor is it enough to read the decisions of the courts for "the courts have progressively narrowed the scope of judicial review";5 and today "the Commission's extensive output of findings and orders is largely free from judicial interference".6 One must look at the work of the Commission itself. Its output of findings and orders alone fills more than two hundred volumes of reports which cover a background of extensive and intricate records, reports of investigations, volumes of valuation reports and the like. It is thus a painstaking task that Professor Sharfman sets out to perform, and he performs it with distinction. For the first time the Commission stands out as the virtual master of its domain of transportation. The importance of this domain to the welfare of the nation, as well as the enormous investment in it, makes it clear that the Commission itself should be subjected to critical study.

This volume is divided into two major divisions. The first deals with the rate level, that is, reasonableness of rates in an absolute sense with special reference to effects on the financial status of the railroads, and without reference to the relationship of rates to each other. The second relates to the rate structure or the requirement that particular rates bear reasonable relationships to each other. Professor Sharfman has sought to extract from a multitude of concrete cases the considerations that seem to have guided the Commission to its conclusions. If these do not always con-

1 P. 3.
2 P. 4.
4 Part I, p. 7.
5 Part I, p. 7.
6 Part I, p. 8.
form to theories of rate-making, and if they turn out to be incapable of statement in simple formulas, it is due to the fact that the task of the Commission has been a severely practical one. Yet it is important to review the principles regarded by the Commission as controlling, for railroad rates are vastly important in the economic life of the nation. Conceivably, they may make or break the economic life of a community or of a particular industry or company. Certain goods may be deemed to be socially important and this may afford grounds for low rates. Remote areas may be incapable of development without the aid of low rates. Rates may grant or deny a virtual monopoly to a particular concern. Transportation costs may be so important a part of the cost of certain goods to the consumer that a change in rates will affect prices. Under the vague standards set for it by the Congress, the Commission might have exercised its power over rates with a view to social and economic objectives only partly related to transportation factors; but Professor Sharfman, who has had a keen eye out for this sort of thing, finds that the instances in which these considerations have been given weight form “an inconsiderable departure from the Commission’s avowed adherence to transportation standards.” *

To one uninitiated into the mysteries of railroad rate making, and this writer counts himself as one such, this book is most revealing. Perhaps its principal revelation is the difficulty and complexity of the subject. It requires the initiated to appraise the author’s treatment of particular problems and no such attempt will be made in this review, for the neophyte will do well if he gains understanding of what is written. Professor Sharfman, however, writes with facility and clarity, so that the neophyte need not hesitate to read this book. The author has not obscured his points with a mass of detail as to particular cases, and the seeker of detail must search through the ample footnotes.

The student of administrative law will be well repaid for a perusal of the book, inasmuch as it is only against a background and knowledge of the work of the administrative body itself, and of the problems with which it must deal, that it is possible to gain understanding of the proper function of the courts in this governmental process. The Commission stands forth here in the maturity of its powers. In this series of books Professor Sharfman is making an outstanding contribution to the understanding of administrative bodies in this country.

BRECK P. MCALLISTER.*

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BOOK NOTES


The Maryland Law Review, a new periodical in the legal field, made its first appearance this past December. It has as its purpose the discussion of those matters so frequently neglected by the longer established journals: legal questions and issues peculiar to a single jurisdiction. This is certainly the logical and advisable objective of any law school affiliated with a state university. It is not to be supposed, however, that the Review's value and appeal will be confined to those lawyers who are at the moment directly interested in the limited subject-matter. The Review will, in time, serve as an indispensable tool to those men who, unfamilar with the uniqueness or confusion of some Maryland law, are required in a very brief time to grasp some phase of this jurisdiction's case or statute law, with its attendant interpretations.

The Review follows the usual style of legal periodicals. Leading articles have treated the questions of Charitable Trusts, Latent Equities, Revocation of Will by Birth of Issue, and Mortgagee's Rights upon a Deficiency. Particular praise is to be given to the material written by the students. The only comment so far, on Ultra Vires Contracts, is unusually clear and interesting treatment of this aspect of Maryland law. The case notes have been confined to Maryland decisions and such Supreme Court rulings as are of interest to a student of Constitutional law. The first two issues of the Maryland Law Review have set an unusually high standard for so young a publication.

J. V. D.


A tax story so old its authorship is obscure, but so good it can never be too often repeated is that of the Englishman who, after muddling through the intricacies of his first income tax blank, returned it to the government, unblemished and unaccompanied by check, with the laconically eloquent explanation: "I have given the matter careful thought and have decided not to join the income tax".

Familiar the story may be, but the moral (to misuse the term) it points is sadly even more familiar. Complexity in tax law, whether that of England or the United States, has become so much the expected thing as to make it also a thing to be accepted as a matter of inevitable course. Congress has apparently given up the ship by accepting the view that it is impossible to write

† Member of the Bars of New York and the District of Columbia.
‡ Undersecretary of the Treasury.
a tax law that will at the same time achieve some degree of fairness in its application to variously situated taxable subjects, and yet remain intelligible. The Treasury, after long inertia, has commenced to combat this defeatist attitude by various attempts at educating the tax-paying public. This past year instructions attached to the taxpayer's copy of his income tax return endeavored to take him a little way into the maze. They did not take him far, and in some respects, like the Treasury Regulations, they served only to spin him around and abandon him to his dizzy fate. Yet they are a beginning and will progressively become of more assistance. (They are promising us a "simplified" tax return for next year.) Then there are the optimistically termed "Helpful Hints for the Taxpayer" offered through the medium of newspaper articles and radio broadcasts during the month or so immediately preceding the March 15 deadline. These are nothing more than a paraphrase of the Treasury Regulations in somewhat less technical language. Like any paraphrase, they sin by omission, and like any "trot" translation, by the use of the colloquial sometimes fail to convey the meaning of the technical language of statute and regulation. Even so, they are probably better than nothing.

The tax student and tax lawyer must needs have more expert help. He is beginning to get it at last from such aids as The Law of Federal Income Taxation, by Messrs. Paul and Mertens (1934), Roswell Magill's admirable Taxable Income (1936), and Mr. Paul's interesting but somewhat less clarifying Studies in Federal Taxation. Prior to these (and they are but a beginning) he has had to rely on two main helps, The Tax Services (which are still in the development stage), and the Handbooks of Mr. Montgomery, more recently the Handbooks of Mr. Montgomery and Mr. Magill. These Handbooks have been appearing for so many years (nearly a score), and in their general plan are so well known to tax practitioner and student alike, that there is little for their reviewer to say besides the happy acknowledgment of their re-appearance. As they grow older they grow fatter (keeping apace with the expansion of the Treasury Regulations; compare the 100 page advantage held by the new Regulations 94, relating to the Income Tax, over its predecessor, Regulations 86, a mere 466 page volume). The Handbook dealing with the Income Tax has taken on the weight of approximately 200 additional pages, and that dealing with Estates and Trusts shows a gain of about half as much. Of especial interest is Mr. Montgomery's reaction to the new corporate taxes of the 1936 Act. As might be expected, he finds the surtax on undistributed corporate profits not at all to his liking.

"Now for a few words regarding the undistributed profits tax. The more I study that tax, the more I find reason to condemn it. It strikes at the medium-sized concern and favors the large corporation. It was intended largely as a means of redistributing wealth, as well as a source of revenue, but its far-reaching effects have never been seriously studied.

"It has some features which are positively brutal as applied to corporations with deficits and debts. Corporations which should pay divi-
dends and do not can be reached effectively under the old law. The new
tax is unsound, complicated and unnecessary. . . . It must be amended.
It is too unfair to survive.”

Though the Preface to the latest Handbooks lacks the length
of some of its predecessors, it lacks none of their fiery spirit. The
old warrior is still in there fighting on the taxpayer’s side. “Since
the law is now rigidly administered, and the Treasury in its regu-
lations uniformly resolves doubtful points in its own favor, tax-
payers must take care to protect their own rights.” And Mr.
Montgomery is there to tell the taxpayers what their rights are.
He scorns the criticism of those who attack his avowed purpose
to point out defects (less euphemistically termed loopholes) in
the tax law. Such critics fail to appreciate the service that is
being performed for the government by the acumen of the author.
The sooner the loopholes are discovered the sooner the govern-
ment can plug them. And Mr. Montgomery has no more careful
readers than those who are in charge of the government’s revenue
affairs. It is the taxpayer’s misfortune (and the author’s, too),
that the watch-dogs of the Treasury can read.

Frank C. Nash.*

HISTORY OF POLITICAL PHILOSOPHY FROM PLATO TO BURKE—

Mr. Cook has presented undergraduate devotees of political
philosophy with a large book treating of large issues in their
lengthy historical development. The volume is given primarily
to a presentation of the theories of leading Western political
philosophers from Plato to Burke, but this purely individual
treatment is valuably supplemented by generous historical back-
grounds and biographical detail. Rightly convinced that lapses
in the honored line of political philosophers has not entailed a
lack of concrete political usage based on actual though unarticu-
lated theory, Mr. Cook includes chapters in which great names
are absent but in which very great influences are analyzed; this
is very necessary in treating the emergence of Plato, for example,
the rise of Roman imperial theory, Medieval contractualism or
the Conciliar movement. From the Reformation onward it is
easier to pick up the thread of renowned individuals.

The general principle underlying this particular history is quite
sound: an appalling number of questions can be raised concern-
ing the origin, nature, functions, limitations and forms of the
state, as the introductory chapter’s long litany will reveal. In
studying the history of political philosophy we study the answers
to those questions given by outstanding theorists. This general
principle should be very helpful to students.

Not unexpectedly Plato seems to baffle Mr. Cook; the Republic
is much safer and more informative than the author’s analysis.

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of this Journal.
† Professor of Political Philosophy, University of California at Los
Angeles.
Great pains are taken to cede full stature to Aristotle; the clear explanation of his theory of "natural slavery" is most welcome. Plato and Aristotle are often condemned for advocating slavery though the precise meaning of Doulos often escapes their critics. The Stoic influence on Rome is fully pictured, but the importance attached to the Cynics is altogether undue; no mention is made of the early comitia existing under the kings. The surprisingly early growth of parliament and theory of contract between ruler and ruled in Spain is neglected completely. A surprising quantity of pages is given to the Middle Ages; the Medieval theory and practice of contractualism and representation is clearly presented, while there is not the usual condemnation of that era's entire theological speculation.

The treatment of political philosophy from the Reformation onward manifests a debt to Harold Laski which was acknowledged in the Preface. The general thesis asserts that political philosophers were for the most part "class philosophers" working sympathetically with property interests for the sake of constitutionalism and representative democracy based on property qualifications. To what extent this thesis is true cannot be nicely determined, though it certainly fits the facts of the rise of Liberalism. The author becomes a bit vehement only when discussing Rousseau; that is quite understandable.

This is a book which will simply have to be accompanied by a lecturer. There are no references given to support the author's interpretations, forcing the student to accept the whole business on testimony. A select bibliography is appended to each chapter, and there is a complete index.

RICHARD O'CONNOR, S. J.


Many a student's earnest prayer is answered by Professor Fenwick's latest contribution to international law. A concise, yet comprehensive case book on that subject is now available. The author has not attempted the preparation of an encyclopedic digest, but rather a useful selection of some of the principal decisions of national and international tribunals. About one hundred and eighty cases are distributed over the twenty-two chapters, the bulk of which deal with peaceful legal relations.

A decidedly helpful feature is the explanatory headnote at the beginning of each section. This is followed by questions suggesting the problems presented by the cases which follow. Supplemental cases are grouped at the end of each chapter subdivision. The introductory chapters (I and II) deal with the Nature of International Law and the Relation of International Law to National Law. The next three chapters are devoted to the State;

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Chapters VI to XIV inclusive deal with various jurisdictional problems. International Treaties, Agents of International intercourse, and Arbitral and Judicial Procedure for the Settlement of International Disputes are each accorded a separate chapter. Forcible Procedure Short of War and Procedure by War complete the volume. The index, while adequate, is not overly elaborate. Very few decisions, except those of American and British courts, have been included. Translations of foreign cases would have been a welcome addition.

The ideal arrangement of materials, and a happy combination of classic cases with more modern decisions makes the casebook doubly effective.

WALTER JAEGER.*


This book is one of the New Commonwealth Institute monographs. It consists of five short and somewhat unrelated essays dealing with the problem of securing justice. The first is an historical and philosophical study of equity by Professor Gustav Radbruch, formerly of Heidelberg. He begins with a distinction between legal and political matters: his question is "whether an equity decision is really the kind of decision appropriate to the essence of political disputes". The New Commonwealth's idea of equity is broader than that of Aristotle, for its tribunal would be expected "not merely to give its judgments in accordance with law corrected by equity, but to rule exclusively in accordance with equity". But if equity is to be above ordinary law, how is it to be related to justice? Equity is identified with rightness; but since its determination must be left to the discretion of a judge, subjective elements appear. Yet, he says, "this apparent impossibility of basing an objective system on a subjective thing, equity, has already been accomplished twice in history, namely, in the Roman ius gentium and in the English Equity". Professor Radbruch seems to think that it would be necessary to stretch the concept of equity to make it serve the purposes of the New Commonwealth.

Nor does such a tribunal receive much encouragement from the essay of Professor H. A. Smith, of the University of London, who studies the Supreme Court of the United States for evidence. He shows, from a number of cases, that this court has always been hesitant to take jurisdiction as between the sovereign states, and that it confines itself to strictly legal questions, leaving political matters to the political departments. Nor does it use coercion to enforce its decisions. Professor Smith ends in an uncertain tone, as if wondering whether his remarks had helped the idea of an Equity Tribunal. Certainly, the Supreme Court of the United States has invaded many fields which it might well

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have left to others; but in so strictly a legalistic system, the Equity Tribunal can find little to emulate.

The essay by Judge Bustamante is simply a brief description of the Central American Court of Justice, and has no bearing whatever upon the idea of equity.

Mr. Norman Bentwich, discussing the role of equity in the jurisdiction of the Judicial Committee of the Privy Council, sticks more closely to his furrow. He is able to show that equity plays an important part in disputes before this body between various parts of the British Empire. Yet he ends by speaking of any dispute whatsoever "which can be solved by the principles of law and equity". Can all disputes be so solved?

The Reverend Donald McLean, of the Catholic University of America, makes a moving appeal to Catholics, based largely upon papal utterances, for "moral disarmament". He substitutes for "peace through justice" another approach: "peace through charity". This, apparently, puts peace above justice, which again does not seem to harmonize with the purposes of the New Commonwealth.

Taken as a whole, the book does not show a unified purpose, nor does it offer much toward the solution of the question which the New Commonwealth Society propounds. With the general objectives of that organization this reviewer has much sympathy. He believes that the organized community of nations must have coercive power sufficiently strong to maintain order; and he recognizes that such power can not be used with much success to prevent the use of violence by a nation which has no other means than violence to remedy its wrongs. A substitute method is needed; but it is much to be doubted whether an Equity Tribunal is a satisfactory substitute method. If a court alone is enough, let the Permanent Court of International Justice decide all cases on the "general principles of law recognized by leading civilized nations". This haphazard collection of essays (even the Preface is irrelevant) contributes little to our understanding of the problem. The New Commonwealth Society is doing good work, and has some excellent publications to its credit; this one, however good the essays may individually be, is not what needs to be done.

Clyde Eagleton.*


It has always been considered an almost necessary prerequisite to a review of this type of book that the reviewer know something of the author, but the background of the writer of this volume is shrouded in mystery. He is described on the cover flap as a "legalist and economist". He certainly claims both titles, if the text is any criterion. Whether he deserves them is another question.

"Social-Economic Security" is another name for one man's concept of Utopia. In order to achieve his ideal the author has

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not been selfish with proposed reforms. With some of them few people will quarrel—and yet it is for the accomplishment of these precise ideals that the most insurmountable hurdles must be cleared. For example, who but the Anti-Saloon League and similar self-appointed protectors of the morals of America would object to a federal lottery plan involving about a billion dollars annually which would finance old age pensions and help finance unemployment relief? Yet, how much chance is there to legalize a lottery with the opposition of such a determined, though numerically tiny, minority? Again, most of us will admit that a complete program of health insurance, such as the author suggests, is a desirable addition to our social security legislation; nonetheless until very recently the medical profession has been almost united in opposing health insurance on the ground that it would tend to socialize the practice of medicine. Then too, there is the enormous cost of such a program, which fact the author dismisses by simply stating that the workers, who are the beneficiaries, can finance it.

Although Mr. Mayer-Daxlanden proposes to keep within limits of the Constitution, the success of his grandly complete plan of socialization (he refuses to admit that cognomen) of the United States depends in large measure upon state action coerced in some undefined way by either the Federal Government or a chimerical enlightened public opinion. The first method is of doubtful legality; the second is impractical.

Mr. Mayer-Daxlanden's program, as a whole, would be an acceptable—nay excellent—subject for a thesis for a college degree, or even for a graduate degree, in Sociological Economics, but it will surely leave the ordinary political and economic liberal gasping for breath. For example: don't smash all labor-saving machinery; that would be senseless. Sound enough! But, proposes the author, tax all labor-saving machinery at 25% to 40% of cost, less 10% per annum for depreciation, and (a typically impractical suggestion) penalize the manufacturer heavily if he passes the tax on to the consumer! Consolidate all the railroads into one private corporation (the "private" is a sop to the Old Guard, apparently); scatter canals liberally throughout the nation (we thrive on competition, evidently); "equalize" silver (whatever that means); force the double-crossing world to pay the war debts; liberalize our immigration policy; make marriage more difficult and divorce simpler; and (twenty-eight pages from the end of a book full of surprises), create one huge utility corporation "under direct supervision and participation of the United States Government. . . . This is not socialism nor would it be a trust in the accurate sense of the word"!

The author's untiring effort at constructive suggestion suffers seriously both from poor grammar (which indicates that possibly his acquaintance with our language has been brief), and from his enunciation of such glorious objectives as " . . . we shall see the day when people will eat breakfast, lunch and supper in subway trains". God forbid!

J. N. S., Jr.
BOOKS RECEIVED

A number of the books listed below will be reviewed in the November issue of the Journal.


PAMPHLETS AND PERIODICALS RECEIVED


